IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEON IRBY,

ORDER

Plaintiff,

03-C-346-C

v.

HONORABLE TOMMY G. THOMPSON, Governor;
JON E. LITSCHER, Secretary, DOC;
CINDY O'DONNELL, Deputy Secretary, DOC;
DICK VERHAGEN, Administrator, DOC;
RICHARD SCHNEITER, Security Chief, DOC;
STEVEN SCHNEITER, Deputy Administrator, Contract Specialist and Liason, DOC;
JAN MINK, Corrections Contract Specialist for DOC;
STEVEN M. PUCKETT, Director, Office of Offender Classification, DOC;
JOHN RAY, Corrections Complaint Examiner (CCE), DOC;
SHARON K. ZUNKER, Director, Bureau of Health Services, DOC;
MARIANNE COOKE, Deputy Administrator, DOC;
GERALD BERGE, Warden, SMCI;
PETER HUIBREGTSE, Deputy Warden, SMCI;
JAMES PARISI, Security Director, SMCI;
TIM HAINES, Echo Unit Manager, SMCI;
GARY BLACKBOURN, Captain of Correctional Officers;
REED RICHARDSON, Captain of Correctional Officers;
LIEUTENANT HORNEL, Lt. of Correctional Officers;
GARY BOUGHTON, Security Director, SMCI;
TRINA HANSON, Program Review Committee Coordinator;
TIM HARIG, Education Department Director, SMCI;
LOUNDA CLARY, Administrative Confinement Review Committee (ACRC) Member, SMCI;
MARLA K. WARERS, ACRC Member, SMCI;

DEBORAH BLACKBOURN, ACRA Member, SMCI;
YVETTE DUESTERBECK, Registrar of Records, SMCI;
H. BLOYER, Record Office Staff III, SMCI;
RON L. EDWARDS, Social Worker, SMCI;
JOHN BELL, Inmate Complaint Examiner (ICE), SMCI;
JULIE BIGGER, ICE, SMCI;
TOM GONZINSKI, ICE, SMCI;
KELLY COON, ICE, Program Assistant, SMCI;
ELLEN RAY, ICE, SMCI;
PAMELA BARTELS, Health Services Unit (HSU) Manager, SMCI;
LIEUTENANT HORNER, Lt. of Correctional Officers, SMCI;
JOHN and JANE DOES 1-100,

Defendants.

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This is a civil action for declaratory, monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Leon Irby, who is currently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, alleges that defendants have violated his constitutional rights in numerous ways. In addition, he has filed a motion for a preliminary injunction, a motion to amend his complaint and a motion to order the assistant attorney general to serve the defendants with his complaints.

Plaintiff filed his complaint originally in the Circuit Court for Dane County, Wisconsin, but defendants removed the case to this court pursuant to 28 U.S.C. § 1441. Although defendants have paid the filing fee, because plaintiff is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915A. 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, the prisoner's complaint must be dismissed if, even under a liberal construction, it 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. See 42 U.S.C. § 1915e.

Plaintiff will be allowed to proceed on the following 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 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 his osteoarthritis.

Plaintiff will not be allowed to proceed on his remaining claims. Also, for the reasons explained below, plaintiff's motions will be denied.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Transfer to and Retention at the Secure Program Facility

Plaintiff was confined at the United States Penitentiary in Leavenworth from February 1998 until March 2000. On March 21, 2000, defendant "Schneiter" (plaintiff does not specify whether it was Richard Schneiter or Steven Schneiter), acting in concert with the other defendants, ordered that plaintiff be transferred to the Wisconsin Secure Program Facility in Boscobel, Wisconsin (formerly the Supermax Correctional Institution), "as soon as possible." Plaintiff had maintained excellent behavior while at Leavenworth; there was no legitimate penological reason for transferring him to the Secure Program Facility. Defendants transferred plaintiff without a hearing. Defendants made the decision to transfer plaintiff in retaliation for "his past, present and prospective successful lawsuits and ICRS complaints." They relied on false and expunged conduct reports in making their decision.

On July 10, 2000, plaintiff filed a complaint with defendant Kelly Coon, an inmate complaint examiner, regarding his placement at the Secure Program Facility. Coon rejected plaintiff's complaint because he used the word "hell" to describe the conditions at the prison. Defendant Gerald Berge, the prison's warden, affirmed the rejection.

Plaintiff's application to be advanced to Level 4 has been denied many times.

B. Racial Disparities

All of the prison staff at the Secure Program Facility are white. Although 46% of the total Wisconsin prisoner population is black, 61% of the inmates at the Secure Program Facility are black. A study conducted in the 1970s found that black prisoners were given more serious punishments for misconduct than their white counterparts. Defendant Berge has released three white inmates at the Secure Program Facility before they completed the level system program. Inmates at the prison have access to "white" television stations only, such as CNN, the Discovery Channel and PBS.

C. Disciplinary Decisions

Defendants have a policy and practice of giving plaintiff more severe punishment than other inmates. In 1975, plaintiff was given "isolation, 6 days on bread and water diet" for misconduct, disrespect and disobeying an order while a "co-violator" was given "a mark and 7 days." In another case in 1980, plaintiff was given three days of adjustment segregation even though the charges against another inmate had been dismissed. In 1995, plaintiff was disciplined for disruptive conduct and threats while another inmate engaging in the same conduct did not get a conduct report.

D. Biased Decision Makers

Many staff members at the prison are married or are otherwise related by law. On November 28, 2000, defendants Gary Blackbourn and Deborah Blackbourn, who are married, conducted plaintiff's six month review. They voted to keep plaintiff at the prison. In doing so, they relied on false conduct reports, did not consider the evidence presented by plaintiff and were biased because they are married. Defendants Peter Huibregtse, Berge, "Schneiter" and Dick Verhagen affirmed the decision on appeal.

E. Inmate Compensation

On June 28, 2000, defendant Huibregtse, the prison's deputy warden, established a new policy with respect to inmate compensation in which he abolished plaintiff's pay for "enforced 'Turning Point,' an alleged educational programming to" prisoners. Defendant Cindy O'Donnell, Deputy Secretary of the Department of Corrections, affirmed Huibregtse's decision. Without this compensation, plaintiff could not purchase stamps, legal supplies and toiletries. This furthered plaintiff's social isolation and denied him access to the courts.

On May 15, 2000, the "Supermax Business office" agreed to pay plaintiff wages of approximately $140 a month. However, defendant John Bell denied plaintiff his wages. Plaintiff requested relief from defendant Huibregtse, who agreed that Bell had acted unlawfully but affirmed his decision nevertheless.

F. Photocopied Legal Documents

The prison has a unique policy forbidding inmates from using the inter-institution legal route to exchange photocopied legal documents. In addition, inmates may not exchange photocopies of case law. On October 10, 2000, plaintiff received a "notice of non-delivery of mail" with respect to a copy of a judicial decision sent to plaintiff by another inmate who was a jailhouse lawyer. Plaintiff appealed the denial to defendant Berge. Defendant Reed Richardson, acting as Berge's designee, affirmed the denial. Plaintiff filed an inmate complaint that was dismissed by defendants Bigger, Huibregtse, Ray, O'Donnell and Berge.

G. Conditions of Confinement

Inmates at the Secure Program Facility are housed in windowless cells that are illuminated at all times. Inmates may not cover their eyes to sleep. Inmates have no access to the outdoors and no contact with other inmates. On Sunday, Monday and Tuesday mornings, prisoners may use the "so-called" exercise facility for up to four hours each week "and/or" they may perform up to 80 minutes of legal research, which is conducted in another cell. While using the law library unit, inmates remain in handcuffs, a waste belt and leg irons.

Only "video visits" are permitted at the prison. Inmates are allowed two 12-minute

telephone calls each month.

Plaintiff's cell is "too cold" in the winter and "extremely and intensely hot" in the summer.

Inmates are subject to video monitoring by both male and female staff members, even while the inmates are undressing, showering or using the toilet.

There are many mentally ill inmates at the prison who act out and create high levels of noise, preventing plaintiff from sleeping or concentrating.

H. Mail

Prison staff read and censor prisoners' private, outgoing mail to family, the media and "citizen groups." As a result, plaintiff's mail is delayed, withheld or not delivered.

Inmates are charged $.40 for a $.34 stamp.

I. Prison Policies

Defendants refuse to retain copies of grievance letters from prisoners. When prison officials communicate with inmates in writing, the inmate is not allowed to have a copy of the communication; he must read it and return it. Correspondence from prison officials often has glue on it. Prison rules are changed frequently and with little or no notice. Defendants do not inspect the housing units for "accessibility," "security" or "climate

assessment."

J. Lack of Programming

Because of staff shortages and limited resources, defendant Tim Harig, the education director, removed plaintiff from a math class. Defendants Berge, Litscher and O'Donnell denied plaintiff placement in the Alcohol and Other Drug Abuse program. Defendants placed plaintiff in the Secure Program Facility, knowing that an adequate treatment program was not available there.

K. Denial of Medical Treatment

Plaintiff is 55 years old. He has been diagnosed with hypertension, osteoarthritis, anemia, irritable bowel syndrome and stomach ulcers. When plaintiff was transferred to the Secure Program Facility, defendants Litscher, O'Donnell, Sharon Zunker, Pamela Bartels, John Ray, Berge and Verhagen approved a change in his hypertension medication to something that was less expensive. Plaintiff continues to suffer from life-threatening conditions such as a low potassium level and severe pain in his lower legs, stomach and bowels. Plaintiff has complained to defendant Bartels, the health services unit supervisor, about these conditions, but she does not respond.

When plaintiff filed an inmate complaint alleging that he "feels as if he is on fire he

is warm," defendant Bigger recommended that the complaint be dismissed because plaintiff had not contacted the health services unit. This was a lie; plaintiff had contacted the health services unit and defendant Bigger knew this. Defendant Zunker adopted Bigger's recommendation, even though she knew of Bigger's "unlawful actions." Defendants Ray and O'Donnell also affirmed the dismissal of the complaint.

In November 2000, plaintiff filed an inmate complaint discussing several issues, including his illnesses. Defendant Bigger dismissed the complaint for having more than one issue and her decision was affirmed by defendants Zunker, Ray and O'Donnell.

In 2001, plaintiff filed an inmate complaint complaining that he was not receiving treatment for his osteoarthritis. Defendant Gonzinski, an inmate complaint examiner, dismissed the complaint on the ground that plaintiff was receiving medical treatment when in fact no such treatment existed. Defendant Zunker, the director of the bureau of health services, affirmed the dismissal, knowing that Gonzinski had acted unlawfully. Defendant Ray, a corrections complaint examiner, "erected an artificial deference" to Zunker's decision and also affirmed the dismissal. Defendant O'Donnell knew of "the defendants' unlawful actions" but affirmed the dismissal anyway.

DISCUSSION

A. Standing

Initially, I note that many of plaintiff's allegations concern general conduct of defendants that is not necessarily related to plaintiff. For example, plaintiff alleges that "many prisoners" are placed at the Secure Program Facility "to fill available bed space." As discussed below, due process does not require prison officials to have a "good" reason, or any reason, for transferring an inmate to a different prison. Even if it did, however, to obtain a remedy under federal law, it is insufficient for plaintiff to allege what defendants "sometimes" do or "usually" do. Parties may not sue the government whenever they believe that it has violated the law. Allen v. Wright, 468 U.S. 737, 754 (1984). Rather, plaintiff must show that defendants violated *his* constitutional rights and that *he* was injured by defendants' conduct. Therefore, plaintiff may not proceed on any claims in which he has alleged that defendants violated the rights of others but not his own.

B. Transfer, Administrative Confinement and Level Review

Plaintiff's complaint includes more than 100 paragraphs regarding his transfer to and retention at the Secure Program Facility. Specifically, he alleges that he was transferred without a hearing and even though he maintained "excellent" behavior while at Leavenworth. He makes similar allegations regarding decisions not to allow him to advance through the prison's level system.

Unfortunately for plaintiff, state officials are not required by the Constitution to have

good reasons for all the actions that they take or to provide an inmate with an opportunity to be heard, even when an action affects the inmate adversely. The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before plaintiff is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Liberty interests do not arise any time a prisoner is subjected to conditions he finds disagreeable. Rather, they are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted).

The Supreme Court has not provided detailed guidance with respect to what conditions may be considered "atypical and significant hardships." However, in Sandin, 515 U.S. at 486, the challenged condition was administrative confinement and the Court held that no liberty interest was implicated. The court of appeals later held that when confinement in disciplinary segregation does not exceed the remaining term of a prisoner's incarceration, Sandin does not allow a suit complaining about deprivation of liberty. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997). In light of these cases, I cannot

conclude that plaintiff's administrative confinement or his inability to advance through the level system go beyond "the ordinary incidents of prison life." Id. at 484. To the extent that plaintiff is alleging he was not given due process before being put in administrative confinement or in conjunction with his movement or lack of movement to various levels within the prison, he has not stated a claim because such procedures are not required in the absence of a liberty interest. See Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) (in absence of liberty interest, "the state is free to use any procedures it chooses, or no procedures at all.").

For the same reason, plaintiff's transfer to Supermax does not implicate a liberty interest. Prisoners do not have a liberty interest in being free from transfers from one institution to another. See Meachum v. Fano, 427 U.S. 215 (1976) (due process clause does not limit interprison transfer even when the new institution is much more disagreeable).

Because defendants' alleged acts of transferring plaintiff to the Wisconsin Secure Program Facility, placing him in administrative confinement and denying him advancement to level 4 do not implicate a liberty interest under Sandin, these claims will be dismissed for failure to state a claim upon which relief may be granted.

C. Retaliation

Plaintiff alleges that he was transferred to the Secure Program Facility for filing "past, present and prospective successful lawsuits and ICRS complaints." Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000); see also Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons.") Plaintiff has a constitutional right to file nonfrivolous lawsuits and to complain about prison conditions. To state a claim for retaliation, a plaintiff need not allege a chronology of events from which retaliation could be plausibly inferred. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, the plaintiff must allege sufficient facts to put the defendants on notice of the claim so that they can file an answer. Id. Therefore, if a plaintiff "merely allege[s] that the defendants . . . retaliated against him for filing a suit, without identifying the suit," this is insufficient to state a claim. Id. Plaintiff fails to identify any suit or suits that he believes prompted a retaliatory transfer and, therefore, has not provided defendants with sufficient notice of his claim. In addition, he alleges that defendants are retaliating against him for "prospective" lawsuits and inmate complaints he has not even filed. However, defendants cannot "retaliate" against plaintiff for something he has not yet done. Plaintiff's claim for retaliation will be dismissed as legally frivolous.

D. Biased Decision Makers

Plaintiff complains that because they are married, defendants Deborah Blackbourn and Gary Blackbourn were biased in deciding to keep plaintiff at the Secure Program Facility. This claim is legally frivolous. There is a constitutional right to an impartial decision only when a liberty interest is implicated. As noted above, plaintiff does not have a liberty interest in being free from confinement at the Secure Program Facility. Because plaintiff was not entitled to a hearing or a review process prior to his transfer to the facility, this court may not inquire into the fairness of the process that plaintiff was given. Second, even if due process did apply, the Constitution would not require that joint decision makers be unrelated, even if it would be sound policy to have such a rule.

E. Disparate Treatment of Prisoners Based on Race

Plaintiff makes several allegations about the race of inmates and staff at the Secure Program Facility and in the Wisconsin prison system in general. For example, he alleges that all the staff at the Secure Program Facility are white while a disproportionate number of the inmates are black. To the extent that these allegations are true, I agree with plaintiff that they are troubling. The existence of racial disparities in either employment or incarceration rates is a legitimate cause for concern. However, there are many reasons why racial disparities exists and not all of them are the result of invidious discrimination. Plaintiff fails

to state a claim under the equal protection clause of the Fourteenth Amendment simply by pointing to a racial imbalance. Washington v. Davis, 426 U.S. 229 (1976). Again, he must allege that *he* was treated differently by a state official because of his race. Therefore, allegations that disparities exist generally or that *other* prisoners were discriminated against are insufficient. Similarly, alleging that some white prisoners have been released before completing the level system program does not state a claim absent allegations from which it can reasonably be inferred that plaintiff was denied the same privilege and that he was similarly situated to the other prisoners. Plaintiff's claims regarding racial discrimination will be dismissed as legally frivolous.

F. Other Unequal Treatment

Plaintiff alleges that there have been several instances in which he was disciplined more severely than other inmates who engaged in the same alleged misconduct. However, plaintiff alleges that each of these instances occurred more than six years ago, one of them reaching back as far as 1975. Actions brought under § 1983 in Wisconsin have a six-year statute of limitations. Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997). Although the application of a statute of limitations is an affirmative defense, the court of appeals has held that a court may raise an affirmative defense on its own if it is clear from the face of the complaint that the defense applies. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir.

2002). In this case, it is clear from plaintiff's complaint that the statute of limitations has expired on these claims. Therefore, I conclude that plaintiff has pleaded himself out of court on his claims that he was disciplined more severely than other inmates. These claims will be dismissed as barred by the statute of limitations.

G. Restraints

Plaintiff alleges that he is required to wear full restraints while using the law library. Although prisoners are entitled to "the minimal civilized measure of life's necessities," Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)), conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F. 2d 105, 108, 109 (7th Cir. 1971). The fact that plaintiff must wear restraints while using the law library does not rise to the level of an Eighth Amendment violation. The use of restraints does not "involve the wanton and unnecessary infliction of pain" or create a condition of confinement that is "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Thus, this claim will be dismissed as legally frivolous.

H. Cell Temperatures

Plaintiff alleges that his cell is too cold in the winter and too hot in the summer. These allegations do not suggest that plaintiff is suffering cell temperatures beyond the constitutionally permissible discomforts of prison life. See Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (prison officials have duty to provide adequate shelter, although conditions may be harsh and uncomfortable). Accordingly, this claim will be dismissed as legally frivolous.

I. Monitoring

Plaintiff alleges that he is subject to video monitoring as he showers and undresses. Although plaintiff's objection to being viewed while unclothed is understandable, it does not provide him with a claim under § 1983. Plaintiff's claim is foreclosed by Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995), in which the Court of Appeals for the Seventh Circuit considered whether a male pretrial detainee was "entitled to prevent female guards from watching [him] while [he] undressed." The court of appeals rejected the plaintiff's Fourth Amendment privacy claim because prisoners " do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life." Id. at 146 ("[C]onstant vigilance without regard to the state of the prisoners' dress is essential. Vigilance over showers, vigilance over cells--- vigilance everywhere, which means the guards

gaze upon naked inmates."). Therefore, this claim will be dismissed as legally frivolous.

J. Mail

Plaintiff alleges that prison staff "read and censor" the outgoing mail of prisoners. As a result, his mail has been "delayed, withheld, not delivered." Plaintiff will not be allowed to proceed on this claim. First, 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). Although inmates have a First Amendment right to be present during the opening of legal mail, Bach v. People of the State of Illinois, 504 F.2d 1100 (7th Cir. 1974), plaintiff does not allege that he is being denied this right. Further, although the First Amendment protects inmates' outgoing mail from censorship, Procunier v. Martinez, 416 U.S. 396 (1974), and from unreasonable delays in mail delivery, Antonelli v. Sheehan, 81 F.3d 1422, 1432 (7th Cir. 1996), plaintiff identifies no particular instance in which his mail was censored or delayed. Although the Federal Rules of Civil Procedure do not require plaintiff to identify legal theories or plead facts satisfying all the elements of a claim, he must at least give defendants notice of the nature of his claim. Without an allegation regarding *what* was censored or delayed, defendants would have no way of knowing how to respond to this claim. Plaintiff's claim that defendants' handling of his mail violated his First Amendment rights will be denied for his failure to state a claim

upon which relief may be granted.

K. Postage Stamps

Plaintiff alleges that he is charged 40 cents for a 34-cent postage stamp and that this is done to limit his ability to communicate with "open society." I understand plaintiff to allege that the higher stamp price violates his First Amendment rights. However, defendants are not constitutionally required to provide postage to plaintiff so that he can correspond with "open society." Thus, the fact that the prison allegedly imposes a 6-cent surcharge does not implicate plaintiff's constitutional rights. Accordingly, this claim will be dismissed as legally frivolous.

L. Photocopied Legal Documents

Plaintiff alleges that there is a prison rule that prohibits inmates from sending photocopies of legal documents to other inmates and that this "thwarts" his ability to receive legal assistance. I understand plaintiff to be alleging that the rule denies his constitutional right of access to the courts. To have standing to bring this claim, plaintiff must allege facts from which an inference can be drawn of "actual injury." See Lewis v. Casey, 518 U.S. 343, 349 (1996). Plaintiff must have suffered injury "over and above the denial." See Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis, 518 U.S. 343). At a

minimum, a plaintiff must allege facts to suggest that the "blockage prevented him from litigating a nonfrivolous case." See id. at 434; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint). This principle derives from the doctrine of standing and requires that plaintiff demonstrate that defendants are frustrating or impeding a non-frivolous legal claim. Lewis, 518 U.S. at 353. Plaintiff does not allege an actual injury, and there are no allegations in his complaint from which it could reasonably inferred that his ability to litigate a nonfrivolous suit has been hindered. Therefore, this claim will be dismissed as legally frivolous.

M. Inmate Compensation

I understand plaintiff to allege that defendant Huibregtse implemented a policy that resulted in plaintiff's losing compensation for his work. However, plaintiff has no constitutional right to compensation for work he performs at the prison. In Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that the loss of "social and rehabilitative activities" are not "atypical and significant hardships" that are constitutionally actionable rights under Sandin, 515 U.S. 472. In Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992), the court stated expressly that a prisoner has no protected liberty interest in a prison job. In Vanskike, the court of appeals

also noted that the Constitution does not require that prisoners be paid for their work. Id. ("[T]here is no Constitutional right to compensation for [prison] work; compensation for prison labor is by 'grace of the state'") (quoting Sigler v. Lowrie, 404 F.2d 659, 661 (8th Cir. 1968)). Plaintiff's contention that he is entitled to a prison job is legally frivolous. In addition, plaintiff's claim that the loss of work-related compensation effectively denies him access to the courts fails as well because, as discussed earlier, plaintiff has not alleged facts from which an inference can be drawn that he suffered an actual injury. Walters, 163 F. 3d at 433-34. Accordingly, plaintiff will not be allowed to proceed on this claim because it is legally frivolous.

N. Free Speech

Plaintiff alleges that defendants Coon and Berge rejected an inmate complaint because plaintiff used the word "hell" to describe his prison conditions. I understand plaintiff to be alleging that these defendants' action violated his rights to free speech and to petition the government for redress of grievances. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987). At this stage, I will assume that plaintiff's grievance is protected speech. Therefore, plaintiff will be allowed to proceed on this claim. To pass constitutional muster, defendants will have to show that their decision

to reject his complaint because it contained the word "hell" was supported by a legitimate penological interest.

O. Prison Policies

Plaintiff identifies a number of practices and policies at the prison with which he is unhappy, such as prison officials' refusal to retain copies of grievance letters and to provide inmates with copies of written communications from prison staff, putting glue on correspondence to inmates, changing rules frequently and without notice and failing to inspect the housing units for "accessibility," "security" and "climate assessment." However, plaintiff does not identify how he was injured by these policies and, in any event, they are not unconstitutional acts. These claims will be dismissed as legally frivolous.

P. Social Isolation and Sensory Deprivation

Plaintiff alleges that he has "no contact with other prisoners," that he has no face-to-face visits with nonprisoners and his telephone calls are limited to two 12-minute calls each month, that he has no access to the outdoors, that his cell has no windows and that his cell is illuminated 24 hours a day. In Jones 'El v. Berge, 00-C-421-C, in which plaintiff is a class member, I concluded that although many of these conditions would not constitute a violation of the Eighth Amendment by themselves, in combination, they could have a

mutually enforcing effect causing the deprivation of a prisoner's basic human need for social interaction and sensory stimulation. See Wilson v. Seiter, 501 U. S. 294, 304 (1991). In Wilson, the Supreme Court held that a combination of conditions having a "mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth or exercise---for example, a low cell temperature at night combined with a failure to issue blankets," might state a claim under the Eighth Amendment. Consistent with Jones 'El and Wilson, I conclude that allegations of constant illumination, limited use of the telephone, no contact visits, no contact with other prisoners, no access to the outdoors and a windowless cell are sufficient to state a claim that defendants Berge and Litscher subjected plaintiff to social isolation and sensory deprivation in violation of his Eighth Amendment right to be free from cruel and unusual punishment.

However, plaintiff is limited in the relief that he can obtain with respect to these conditions, even if he prevails on the claims. As plaintiff is aware, the conditions about which he complains were certified for class treatment and addressed by the settlement agreement in Jones 'El. In approving the agreement, I concluded that it was fair, reasonable and lawful. See Jones' El v. Litscher, 00-C-421-C, Order dated March 28, 2002, dkt. #207, at 8. Therefore, plaintiff cannot obtain injunctive relief on his claim of social isolation and sensory deprivation and, if he prevails on the claim, can obtain monetary damages for these conditions only from the date of his incarceration at the Wisconsin Secure Prgoram Facility

until March 28, 2002, the date I approved the settlement agreement. This means that in acquiring evidence to prove his claim, plaintiff should focus solely on evidence showing the conditions as they existed between the date of his arrival and March 28, 2002. To the extent that plaintiff believes that defendants have not been complying with the settlement agreement since it was approved, he will have to direct his concerns to the monitor.

Moreover, plaintiff should be aware that he faces an uphill battle on this claim. Not only will he have to show that he was deprived of any meaningful amount of social interaction and sensory stimulation, he will also have to show that this deprivation created a substantial risk of serious harm for him. The allegations in plaintiff's complaint provide almost no details regarding this claim. Although the Federal Rules of Civil Procedure permit plaintiffs to allege in a complaint the bare minimum of facts that are sufficient to give the defendant notice of the plaintiff's claim, the procedure is much different on a motion for summary judgment. If defendants later move for summary judgment and plaintiff does nothing more than restate his allegations in affidavit form, I will have to dismiss the claim. Fed. R. Civ. P. 56 requires parties to "set forth specific facts which show that there is a genuine issue for trial." See also Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) ("The object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.") Plaintiff will have to present sufficient evidence to permit a reasonable jury to find in his favor.

Q. Sleep Deprivation

I understand plaintiff to allege that he is forced to sleep under illuminated lights with his face uncovered and that he is housed with mentally ill inmates who create excessive noise, both of which cause him to be sleep deprived. Although illumination and excessive noise may not rise to the level of an Eighth Amendment violation in and of themselves, when they are coupled with the allegation that plaintiff suffers sleep deprivation, I cannot say that plaintiff could not prove any set of facts entitling him to relief on this claim. Accordingly, plaintiff will be allowed to proceed on this claim against defendants Berge and Litscher.

R. Lack of Rehabilitative Treatment

Plaintiff alleges that he was pulled out of a math class because of a lack of resources and denied drug and alcohol treatment. In addition, he alleges that defendants Berge, Verhagen, Litscher , O'Donnell and Schneiter placed him in the Secure Program Facility "without treatment program available." I understand plaintiff to be contending that defendants violated the Eighth Amendment by failing to provide him with sufficient rehabilitative treatment.

The Court of Appeals for the Seventh Circuit has recognized a constitutional right to treatment for some institutionalized persons. See Nelson v. Heyne, 491 F.2d 352 (7th

Cir. 1974) (holding that incarcerated juveniles have a constitutional right to rehabilitative treatment). However, it has never extended the holding in Nelson to adult prison inmates, although other courts have suggested that the absence of programming could constitute an Eighth Amendment violation when the inmates are being denied the minimal civilized measure of life's necessities. See Lewis v. Washington, 197 F.R.D. 611, 615 (N.D. Ill. 2000) (citing Rhodes v. Chapman, 452 U.S. 337 (1981)). Assuming that there is some right to treatment, plaintiff has nevertheless failed to state a claim. The court of appeals has held that a prisoner has no right to receive a particular rehabilitative program. Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996). There are no allegations in plaintiff's complaint that would permit me to reasonably infer that he is not receiving the minimal civilized measure of life's necessities. This claim will be dismissed as legally frivolous.

S. Denial of Medical Treatment

Plaintiff includes a number of allegations regarding medical care in his complaint: (1) his blood pressure medication was switched when he was transferred to the Secure Program Facility; (2) he complained to defendant Bartels repeatedly about severe pain in his lower legs, stomach and bowels but she did not respond; (3) he wrote inmate complaints that he was feeling warm and that he was not receiving any treatment for his osteoarthritis, but the complaints were dismissed on false grounds.

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Therefore, plaintiff must establish facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). See Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). In attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they 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. See Gutierrez, 111 F.3d at 1371, 1373. ("'serious' medical need is one that has been diagnosed by a physician as mandating treatment"). Plaintiff alleges that he repeatedly suffered severe pain in his lower legs, stomach and bowels. These allegations are sufficient to suggest that he had a serious medical need.

The Supreme Court has held that deliberate indifference requires that "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." Farmer v. Brennan, 511 U.S.

824, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91; Franzen, 780 F.2d at 652-53. Deliberate indifference in the denial or delay of medical care can be shown by a defendant's actual intent or reckless disregard. Reckless disregard is highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. See Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

The question is whether the denial of medical treatment is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition," Snipes, 95 F. 3d at 592, giving rise to a claim of deliberate indifference. See also Estelle, 429 U.S. at 104 (holding that deliberate indifference "is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed")

Plaintiff's contention that he was given a cheaper medication will be dismissed as legally frivolous. Plaintiff does not have a right to receive a particular brand of medication or a non-generic drug. See Abdul-Wadood v. Nathan, 91 F.3d 1023, 1024-25 (7th Cir. 1996). Nothing in plaintiff's allegations allows an inference to be drawn that the new

medication was any less effective or that defendants changed his medication with a reckless disregard for his health or safety.

Plaintiff will be allowed to proceed against defendant Bartels on his claim that she disregarded his complaints regarding lack of treatment. Severe pain is a serious medical need. See Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996). If plaintiff can prove that defendant Bartels knew that he was in severe pain and that she could have taken steps to alleviate his pain but did not do so out of a reckless disregard for plaintiff's health, he may be entitled to relief. However, it will be insufficient for plaintiff to show that defendant Bartels disagreed with plaintiff's assessment of his medical needs or that she did not respond because she believed others were providing plaintiff with appropriate care. Rather, plaintiff will have to show that she acted intentionally or recklessly in denying plaintiff treatment.

Finally, I will allow plaintiff to proceed on his claim that defendants Gonzinski, Ray, Zunker and O'Donnell dismissed his complaint that he was not receiving any treatment for his osteoarthritis. Again, if plaintiff's allegation is true that he was not receiving any treatment *and* if defendants *knew* that plaintiff was not receiving treatment *and* they *knew* of or *recklessly disregarded* the risk that failing to receive any treatment would cause plaintiff great pain, these defendants may have violated plaintiff's Eighth Amendment rights.

However, "feeling warm" is not a serious medical need. Therefore, defendant Bigger did not violate plaintiff's Eighth Amendment rights when she dismissed his complaint on

that issue.

T. State Law Claims

Plaintiff has included numerous state law claims in his complaint, consisting mostly of allegations that defendants violated various Department of Corrections regulations in transferring plaintiff to the Secure Program Facility and refusing to advance him through the level system. Generally, the Eleventh Amendment prohibits a federal court from ordering state officials to conform their conduct to state law. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984). However, because defendants removed this case from state court, they have waived their right to assert that they are immune from suit under the Eleventh Amendment. Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613 (2002). Although defendants are not immune, this does not mean necessarily that I should exercise supplemental jurisdiction over plaintiff's state law claims. Typically, I exercise supplemental jurisdiction over a plaintiff's state law claims when the state law claim arises out of the same operative facts as the federal claims on which I have allowed the plaintiff to proceed. See 28 U.S.C. § 1367(c)(3); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or refuse jurisdiction over state law claims). Because none of plaintiff's state law claims relate to the claims on which he is being allowed to proceed, I will decline to exercise supplemental jurisdiction over those

claims and remand them to state court.

U. Motion for a Preliminary Injunction and to Amend the Complaint

After defendants removed this case to federal court, plaintiff filed a motion for a preliminary injunction. Although it is not entirely clear what plaintiff is seeking in his motion, it appears that he is requesting an order that defendants advance his placement in the level system immediately. He also requests permission to amend his complaint to include new allegations regarding the defendants' refusal to allow him to proceed to Level 4. Both of plaintiff's motions will be denied. Because I have concluded that plaintiff has failed to state a claim with respect to his allegations that defendants are violating his constitutional rights by refusing to advance his placement more quickly, plaintiff's motion for a preliminary injunction will be denied. Similarly, amending the complaint to include recent developments with respect to these claims would be futile. Rodriguez v. United States, 286 F.3d 972, 980 (7th Cir. 2002). Therefore, I will deny plaintiff's motion to amend his complaint to provide an update on his movement or lack of movement in the level system.

V. Motion to Compel

Although plaintiff appears to have accomplished service of his complaint on several

defendants, he has requested that the court order the attorney general's office to serve many of the remaining defendants. This motion will be denied as unnecessary. Under the agreement between this court and the Wisconsin Department of Justice, the department "will seek to obtain authority to admit service of process on behalf of defendants in litigation commenced by prison inmates pro se." If the department is unable to accept service on behalf of a defendant because, for example, that defendant is no longer employed by the state, service may then be attempted by the United States Marshals. Thus, court intervention is not required at this time, with one exception.

The court is aware from other litigation in this court that defendant Pam Bartels no longer works at the Wisconsin Secure Prison Facility and when she did, she was an employee of a private corporation, Prison Health Services, Inc., not an employee of the prison or the Department of Corrections. Therefore, there is no reason to believe that an assistant attorney general who represents Department of Corrections employees would accept service of process on her behalf or have personnel records relating to her.

Even if the Department of Corrections had a personal address for defendant Bartels, plaintiff is not entitled to know it. In Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990), the Court of Appeals for the Seventh Circuit recognized the serious security concerns that arise when prisoners have access to the personal addresses of former or current prison employees. The concerns are no less serious when the employees are contract employees.

The record in this case shows that before the case was removed to this court, Circuit Judge John Albert found plaintiff financially eligible to proceed in forma pauperis. Therefore, I will request that the United States Marshal serve defendant Bartels with plaintiff's complaint. As the Marshal is already aware, it is possible that defendant Bartels's lawyer, Douglas Knott, a member of the Milwaukee law firm of Lieb & Katt, would be willing to accept service of process on her behalf. In this event, it will be unnecessary for anyone other than Knott to know her personal address.

ORDER

IT IS ORDERED that

1. Plaintiff Leon Irby is GRANTED leave to proceed under 28 U.S.C. § 1915A on his claims that

(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 his osteoarthritis.

2. Plaintiff is DENIED leave to proceed on all other federal claims.

3. I decline to exercise supplemental jurisdiction over plaintiff's state law claims. These claims are REMANDED to the Circuit Court for Dane County, Wisconsin.

4. Defendants Tommy Thompson, Dick Verhagen, Richard Schneiter, Steven Schneiter, Jan Mink, Steven Puckett, Marianne Cooke, Peter Huibregtse, James Parisi, Tim Haines, Gary Blackbourn, Reed Richardson, Lieutenant Hornel, Gary Boughton, Trina Hanson, Tim Harig, Lounda Clary, Marla Warers, Deborah Blackbourn, Yvette Duesterbeck, H. Bloyer, Ron Edwards, John Bell, Julie Bigger, Ellen Ray, Lieutenant Horner and John and Jane Does 1-100 are DISMISSED from this case.

5. Plaintiff's motion for a preliminary injunction, to amend his complaint and to compel the assistant attorney general to serve his complaint on the defendants are DENIED.

6. The United States Marshal is requested to serve plaintiff's complaint on defendant Pam Bartels.

7. For the remainder of this lawsuit, plaintiff must send a copy of every paper or document that he files with the court to counsel for the defendants, Douglas Knott and Assistant Attorney General John Glinski. The court will disregard documents plaintiff

submits that do not show on the court's copy that plaintiff has sent a copy to defendants' attorneys.

8. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 2nd day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge