IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PARISH GOLDEN,

ORDER

Petitioner,

03-C-0403-C

v.

GERALD BERGE, JON LITSCHER,
LINDA HODDY-TRIPP, BRIAN KOOL,
ELIZABETH HINKLEY and
DOES1 THROUGH 100,

Respondents.

- -

This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Dodge Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Petitioner alleges that respondents violated his Eighth Amendment rights by confining him to his cell twenty-four hours a day, prohibiting him from outdoor exercise during the entire period of his confinement, restricting him to a cell that was illuminated at all times and frequently kept at extreme temperatures, failing to advise him of fire evacuation procedures, depriving him of food and denying him adequate medical treatment. In

addition, petitioner alleges that respondents deprived him of his First Amendment rights by restricting his right to possess certain publications.

From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is currently an inmate at the Dodge Correctional Institution in Waupun, Wisconsin. He was confined at the Wisconsin Secure Program Facility (formerly known as the Supermax Correctional Institution) in Boscobel, Wisconsin from June 15, 2000 through March 21, 2002, in which time the incidents giving rise to his complaint took place. Respondent Gerald Berge was the warden at the facility at all relevant times. Respondents Linda Hoddy-Tripp and Brian Kool were both unit managers of the Charlie unit of the facility during this time. Respondent Jon Litscher is the Secretary of the Wisconsin Department of Corrections. Respondent Elizabeth Hinkley was a nurse practitioner at the facility at all times relevant to this suit.

A. Conditions of Confinement

Petitioner was subjected to total isolation while he was confined at the facility. He was locked in his cell twenty-four hours a day and was not exposed to the outdoors at any time during his confinement. His cell walls were made of concrete. There was a solid "boxcar" door and no window.

The only exercise room provided to prisoners at the facility was inadequately ventilated and neither heated nor cooled.

Petitioner's cell was illuminated twenty-four hours a day. He was awakened every hour if his head was covered while he slept. As a result, he suffered chronic sleep deprivation, head and eye pain and other psychological injuries, including confusion and depression.

Petitioner was subjected to extreme cell temperatures resulting in physical and psychological injury.

Petitioner was not informed of the evacuation procedures to be followed in the event of fire and he is not aware of any testing of the evacuation procedures.

Petitioner was served apples which contained small fragments of chipped metal. Since then, he has lost weight because he fears that all of his food may have been tampered with.

B. Medical Care

On June 25, 2001, petitioner submitted a health services request form seeking treatment from the institution's medical staff for his left ear, which had started to bleed. The next day he was treated with a triple antibiotic. This treatment did not stop the pain or discharge. On July 3, 2001, the facility's medical staff prescribed Cortisporin Otic Fluid for petitioner. When petitioner's condition did not improve, respondent Hinkley, a nurse practitioner, obtained a culture from petitioner's ear and prescribed him Vosol Otic drops. The culture was analyzed at Bellin Health laboratories on July 23 and 24, 2001and revealed

a yeast infection.

At a July 28, 2001 visit with the institution's medical staff, petitioner was denied an oral request to be taken to the University of Wisconsin Medical Center in Madison, Wisconsin for treatment. Because the pain and discharge persisted, petitioner sent the facility's medical staff a message on August 11, 2001, in which he asked why he hadn't been receiving any more ear drops and again requested to be taken to Madison for medical treatment. A member of the medical staff responded by informing petitioner that he was scheduled for a follow up visit with the doctor on the next day. At that visit, petitioner was prescribed Cotisporin ear drops and Clotrimazole cream. On August 27, 2001, respondent Hinkley treated petitioner again. Hinkley prescribed a fifth treatment consisting of Oral Diflucan and Floxin Otic drops. Respondent Hinkley noted in petitioner's progress report that petitioner had significant otitis externa caused by a staph and yeast infection and that all previous attempts to treat the infection had been ineffective.

Petitioner submitted another health services request slip on September 4, 2001, informing the medical staff that he was still in pain and again requesting to be sent to Madison for treatment. That same day, respondent Hinkley sent petitioner a reply in which she stated that she had spoken with an ear, nose and throat specialist who recommended a Lotrimin solution be applied to petitioner's ear for one week. The reply also stated that petitioner would be sent to Madison if the solution did not work. On September 6, 2001,

petitioner was given ibuprofen after requesting something to dull the pain in his ear.

Petitioner submitted a third health services request slip on September 14, 2001, in which he complained of the continuing pain and discharge in his left ear. Respondent Hinkley met with petitioner three days later and informed him that he would be seen by the ear, nose and throat specialist. Respondent Hinkley's progress notes from this meeting indicate that petitioner had been "treated with everything we can think of without results."

Petitioner's condition continued to deteriorate. In September he experienced migraine headaches, ear aches and dizziness. He feared he might lose his hearing in the affected ear. He submitted a fourth health services request form on September 26, 2001, to which respondent Hinkley responded by informing petitioner that she had filled out forms requesting authorization for petitioner to be taken to the specialist for treatment and marked the request as urgent. Petitioner was scheduled to see the specialist in early November.

Petitioner was not seen by the specialist until December 7, 2001. During the months of October and November, he filed five more health services request slips. Sometime in October, petitioner was given Vicodin for his pain. On November 1, 2001, petitioner filed an inmate complaint, claiming that he was not receiving adequate medical treatment. He complained to respondent Hinkley again on November 4, 2001, and to respondent Berge on November 19, 2001, that he had still not been treated and that he continued to be in severe pain. On November 20, 2001, a member of the institution's medical staff informed

petitioner that his appointment with the specialist was soon. Petitioner was not adequately treated for the infection until December 7, 2001. From June 25, 2001 through December 7, 2001, petitioner suffered increasingly severe pain as a result of his ear infection.

C. First Amendment

______Petitioner was not permitted to possess any publications other than a bible and an address book. He was not permitted to receive or possess any other publications, including legal books.

OPINION

A. General Standards

Petitioner has alleged that respondents violated his First and Eighth Amendment rights. As a general matter, an inmate suing under § 1983 states a claim for a violation of his Eighth Amendment right to be free from cruel and unusual punishment when he alleges facts tending to demonstrate that he has been subject to a substantial risk of serious harm (objectively) and that prison officials knowingly disregarded this risk (subjectively). Farmer v. Brennan, 511 U.S. 825, 828 (1994); Doe v. Welborn, 110 F.3d 520, 523 (7th Cir.1997). Additionally, prison actions will not be held to violate an inmate's First Amendment rights if they are reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S.

78, 89-90 (1987).

B. Conditions of Confinement

1. Exercise deprivation

Petitioner alleges that for the two years he was imprisoned at the Wisconsin Secure Program Facility, he was confined twenty-four hours a day to a cell with a "boxcar" style door and no windows. He alleges that he was not exposed to the outdoors and that the only exercise room available to him was so inadequately ventilated and neither heated nor cooled, that he simply forwent his recreational time outside his cell. Although none of these conditions might not be enough to establish an Eighth Amendment violation, in and of itself, the Supreme Court has recognized that certain conditions "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 such as food, warmth or exercise." Wilson v. Seiter, 501 U.S. 294, 304 (1991) (construing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). For instance, while outdoor activity might not be required when prisoners have other recreational activities available most of the day, Clay v. Miller, 626 F.2d 345, 347 (1980), it may be required when prisoners are otherwise confined to their cells at all times, Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979).

Although petitioner has claimed that he was subject to "total isolation," he has not alleged the kind of specific conditions were alleged by other prisoners at the facility in Jones'el v. Berge, 00-C-421-C, that I held cause social isolation and sensory deprivation in combination. Therefore, I do not construe petitioner's complaint to claim this kind of deprivation. Even were petitioner to amend his complaint to add these allegations of specific conditions, he would be barred from pursuing this claim because, as I explained in Freeman v. Berge, 03-C-21-C, respondents Berge and Litscher are entitled to qualified immunity from a social isolation and sensory deprivation claim.

However, the complaint does describe conditions that could combine to deprive petitioner of exercise. The Court of Appeals for the Seventh Circuit has recognized that a denial of adequate opportunity to exercise may be an Eighth Amendment violation. Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996); French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1986); Harris v. Flemming, 839 F.2d 1232, 1236 (7th Cir. 1988). However, a constitutional violation occurs only "in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened." Antonelli, 81 F.3d at 1432. There is no Eighth Amendment violation when opportunities to exercise are merely less than desirable. See Harris, 839 F.2d at 1236 (no violation where petitioner could have moved about his segregation cell by doing push-ups, aerobics or jogging in place). Further, the threat to an inmate's health must be more than mere discomfort. Compare French, 777

F.2d at 1255 (lack of exercise could rise to constitutional violation where muscles are allowed to atrophy); with Harris, 839 F.2d at 1236 (inconvenience and discomfort insufficient basis for exercise deprivation claim).

Although petitioner has not articulated an injury caused by exercise deprivation, his complaint will be liberally construed to state an Eighth Amendment claim based on his allegations that he was confined to his cell twenty-four hours a day in an institution where the only exercise facility was so cold or so hot or so poorly ventilated that it could not be used. See Haines, 404 U.S. at 521. However, petitioner should be aware that in order to succeed on this claim, he will need to produce evidence of conditions in the exercise facility that made the facility unusable and demonstrate that his opportunity for movement was so restricted as to actually threaten his health. Because respondent Berge, as Warden of the facility, and respondent Litscher, as Secretary of the Wisconsin Department of Corrections, have responsibility for the general conditions of the facility, petitioner will be granted leave to proceed against them on this claim.

2. Cell illumination

I understand petitioner to allege that he was forced to sleep with his face uncovered under constant lighting, which caused him to suffer chronic sleep deprivation, head and eye pain and other psychological injuries, including confusion and depression. Although

constant illumination in the prison would not ordinarily state a claim under the Eighth Amendment, petitioner has alleged that the lighting caused him to suffer sleep deprivation and other related injuries. I cannot say that petitioner could not prove any set of facts entitling him to relief on this claim. Therefore, petitioner will be allowed to proceed on this claim against respondents Berge and Litscher.

3. Cell temperature

Petitioner alleges that he was exposed to extreme heat and cold. Ordinarily, an allegation that the cell temperature is merely too hot or cold is not sufficient to suggest that an inmate is suffering temperatures beyond the constitutionally permissible discomforts of prison life. See Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (duty of prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable). However, in this case, petitioner alleges that his exposure to the extreme temperatures caused him physical and psychological injury. "Courts should examine several factors in assessing claims based on low cell temperature, such as the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold." Id. Although petitioner's allegations are vague as to the nature of his "physical and psychological" injuries, I cannot say that he cannot prove a set of facts amounting to an

Eighth Amendment violation. Therefore, I will grant him leave to proceed on this claim against respondents Berge and Litscher.

4. Fire evacuation procedures.

Petitioner alleges that he was not informed of any evacuation procedures to be followed in the event of a fire and he is not aware of any testing of the procedures. Prison officials have a duty under the Eighth Amendment to provide humane and generally safe conditions of confinement. See Farmer, 511 U.S. at 832. An inmate may state a claim for injunctive relief when an official has been deliberately indifferent to both present and possible future harm to the health and safety of a prisoner. Helling v. McKinney, 509 U.S. 25, 33-35 (1993). "Deliberate indifference" is a subjective standard that is satisfied when an official knows of and disregards an excessive risk to an inmate's health and safety.

Ordinarily a prisoner would be able to pursue injunctive relief to prevent possible future harm to his health or safety. See Helling, 509 U.S. at 33-35. However, petitioner is no longer incarcerated at the facility and his claim for injunctive relief from the alleged lack of fire evacuation procedures at that facility is moot. See Ostrander v. Horn, 145 F. Supp. 2d 614, 618 (M.D.Pa. 2001) (dismissing claim charging absence of fire evacuation procedures as moot because prisoner transferred). Petitioner is also barred from pursuing monetary damages on this claim because he has not alleged that he suffered a

constitutionally cognizable injury resulting from a respondent's alleged failure to inform him of the evacuation procedures. See Doe, 110 F.3d at 524 (petitioner must suffer actual injury to state claim under § 1983 because it is tort statute). Petitioner does not have an Eighth Amendment right to be informed of fire evacuation procedures. See Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985) (no Eighth Amendment violation where fire evacuation procedures on bus did not allow prisoners to free themselves). Because petitioner may not recover either monetary or injunctive relief on this claim, the claim will be dismissed.

5. Food Contamination.

Petitioner alleges that on one occasion he was served apples containing small fragments of metal. Since that time, he has lost weight because he fears that all his food is contaminated. The Supreme Court has recognized that it would be a violation of the Eighth Amendment to deny a prisoner an "identifiable human need such as food." Wilson, 501 U.S. at 304. Several lower courts have held that a prisoner is subject to a substantial risk of serious harm when food is withheld for long periods of time. See e.g., Simmins v. Cook, 154 F.3d 805, 809 (8th Cir. 1998) (denial of four consecutive meals over a two-day period created substantial risk of serious harm); Cooper v. Sheriff of Lubbock County, 929 F.2d 1078 (5th Cir. 1991) (denying inmate food for twelve consecutive days violated prisoner's

Eighth Amendment rights).

Petitioner does not allege that respondents are denying him food or even that any one of them was involved in the one incident of food contamination he experienced. Although petitioner notes that he has lost weight because he fears that his food continues to be contaminated, he has not alleged either that his food continues to be contaminated or any facts tending to support his suspicion. Petitioner's own decision to forgo meals does not make out a claim of a constitutional violation entitling him to relief.

C. Medical Care

Petitioner alleges that from June 25, 2001 through December 7, 2001, he underwent a series of unsuccessful treatments for an infection in his left ear. He contends also that his request for treatment from a specialist went unfulfilled from September 4, 2001 until December 7, 2001. During this time, he asserts that he suffered increasingly intense pain in his ear, headaches, dizziness and other psychological and physical injury.

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,

petitioner's allegations must be sufficient to allow an inference to be drawn 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"). Petitioner alleges that he suffered severe and continuous pain in his left ear as a result of an ear infection. This allegation is 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, 511 U.S. at 837. 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). A delay in calling in a medical specialist is not enough by itself to suggest that a prison official acted with deliberate; the denial or delay must be in reckless disregard of an excessive risk to petitioner's health. See Todaro v. Ward, 565 F.2d 48, 53 n.5 (2nd Cir. 1977) (affirming rejection of deliberate indifference claim based on lack of access to outside specialists).

Although petitioner has alleged facts sufficient to establish that he suffers from a serious medical need, he has not alleged that the respondents were deliberately indifferent to his needs. Indeed, his factual allegations reveal that while he was suffering from his infection, he was prescribed six different treatment regimens, seen by a staff doctor or nurse practitioner on six occasions and given pain medication in response to every complaint of continuing pain. Respondent Hinkley sought and used the advice of an ear, throat and nose specialist in treating petitioner. Additionally, I take judicial notice of the fact that all the medications prescribed for petitioner are specifically indicated for use on otitis externa (inflammation of the external auditory canal due to bacterial infection) or candidiasis (yeast infection). Physicians' Desk Reference 2158, 1213-15, 2594-98, 3048-49 (57th ed. 2003).

Although petitioner may disagree with the decision to pursue multiple courses of treatment before referring him to a specialist, such a disagreement does not rise to the level

of deliberate indifference. See Snipes, 95 F.3d at 590. "A prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition.'" Id. at 592. There was a two-month delay from the time respondent Hinkley advised petitioner that she had put in a referral request form until the time petitioner actually saw the specialist. However, treatment was ongoing throughout this period. According to the medical records petitioner attached to his complaint, he was provided with medication during this time. There was no delay in treatment, but only a delay in treatment by a specialist. Petitioner was not entitled to whatever treatment he desired; he was entitled only to the level of treatment that meets the standards of the Eighth Amendment.

Because I conclude that petitioner's factual allegations do not make out a claim that the medical treatment he received was so inappropriate as to rise to the level of a constitutional claim, he will be denied leave to proceed on this claim.

D. First Amendment

I understand petitioner to contend that respondents are violating his First Amendment rights by denying him access to certain publications, including legal books, and restricting him to possession of one bible and one address book.

"Penal regulations impinging upon inmates' constitutional rights are valid when reasonably related to legitimate penological interests." Jackson v. Elrod, 881 F.2d 441, 446 (7th Cir. 1989). See also Turner, 482 U.S. at 89-90. From other complaints filed in this court by inmates at the Wisconsin Secure Program Facility, I take judicial notice that the restriction on periodicals and publications at the facility is part of the institution's incentive-based level system. See, e.g., Tiggs v. Berge, No. 00-C-317-C, Op. and Order entered Aug. 31, 2000, at 26, in which I held that the facility had a legitimate penological interest in the book restriction. Id. Application of the level system restriction does not state a claim under the Eighth Amendment and petitioner has not alleged that he receives fewer books than he should under this system.

However, this case differs slightly from other cases litigated in this court on this topic because petitioner in this case alleges that he was prevented from possessing legal books. Therefore, I understand petitioner's complaint to include a claim that the restriction on legal books deprives him of his constitutional right of access to the courts.

To have standing to bring this claim, petitioner must allege facts from which an inference can be drawn of "actual injury." See Lewis v. Casey, 518 U.S. 343, 349 (1996). Petitioner 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). Minimally, petitioner must allege facts to suggest that the restriction "prevented him from litigating a nonfrivolous case."

See id. at 434; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (petitioner may sustain burden of establishing standing through factual allegations of complaint). This principle derives from the doctrine of standing and requires petitioner to demonstrate that respondents are frustrating or impeding a non-frivolous legal claim. Lewis, 518 U.S. at 353. There are no allegations in petitioner's complaint from which it reasonably could be inferred that his ability to litigate a nonfrivolous suit has been hindered and petitioner has therefore failed to state and actual injury. Therefore, I will dismiss his claim that he was denied his right of access to the court because of restrictions on his ability to possess legal books.

ORDER

IT IS ORDERED that

1. Petitioner Golden's request for leave to proceed in forma pauperis is GRANTED on his claims that

(a) Respondents Berge and Litscher violated his Eighth Amendment rights by denying him the ability to exercise;

(b) Respondents Berge and Litscher violated his Eighth Amendment rights by subjecting him to sleep deprivation and other physical and psychological injuries as the result of constant cell illumination;

(c) Respondents Berge and Litscher violated his Eighth Amendment rights by causing

him physical injury as a result of severe cell temperatures.

2. Petitioner Golden's request for leave to proceed in forma pauperis is DENIED on his claims that

(a) Respondents violated his right to be free from cruel and unusual punishment by failing to inform him of fire evacuation procedures;

(b) Respondents violated his right to be free from cruel and unusual punishment by depriving him of food;

(c) Respondents violated his Eighth Amendment right to receive adequate medical care by delaying access to a specialist;

(d) Respondents violated his First Amendment rights by restricting the books he was permitted to possess to one bible and one address book.

3. Respondents Hinkley, Hoddy-Tripp, Kool and Does 1 through 100 are DISMISSED from this case.

4. For the remainder of this lawsuit, petitioner must send respondents Berge and Litscher a copy of every paper or document that he sends to the court relating to this case. Once petitioner has learned the name of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondents or to respondents' attorney.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. The unpaid balance of petitioner's filing fee is $141.89; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 25th day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge