IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TONIE CURTIS COTTON,

ORDER

Petitioner,

03-C-468-C

v.

PHIL KINGSTON (Warden);
TIMOTHY DOUMA (Security Director);
ASHWORTH (Lieutenant);
NEWMAN (Correctional Officer; Sargent); and
PAT SIEDSCHLAG (Health Services Supervisor),

Respondents.

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This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983 and the Eighth Amendment. Petitioner, who is presently confined at the Columbia Correctional Institution in Portage, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Although petitioner was assessed an initial partial payment of the $150 fee for filing his complaint, he has since submitted trust fund account statements that show that he no longer receives periodic income and that his account is depleted. Therefore, I conclude that petitioner is eligible under 28 U.S.C. § 1915(b)(4) to proceed in forma pauperis without prepaying any portion of the filing fee.

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 Tonie Curtis Cotton is an inmate at Columbia Correctional Institution in Portage, Wisconsin. Respondent Phil Kingston serves as warden of Columbia Correctional Institution and is responsible for the care, custody and discipline of inmates incarcerated

there. Kingston is also responsible for ruling on the second step of the inmate complaint procedure. Respondent Timothy Douma is the security director at Columbia Correctional Institution and is responsible for inmate care, custody and discipline, as well as staff supervision and hiring. Respondents Ashworth and Newman are correctional officers at Columbia Correctional Institution responsible for inmate care, custody and discipline, as well as staff supervision and hiring. Respondent Pat Siedschlag serves as the health services unit supervisor at Columbia Correctional Institution and is responsible for inmate health maintenance and care as well as health services staff supervision.

On July 15, 2003, after returning from a vocational class in general population at Columbia Correctional Institution, respondents Newman and Ashworth approached petitioner and told him to stick out his hands to be cuffed. They told petitioner he was being moved to disciplinary segregation unit one. As he was being escorted to the segregation unit, petitioner asked why he was being taken to segregation. In response respondent Ashworth turned and spit chewing tobacco on petitioner's pants leg and said, "I don't have to tell you anything, Nigger."

As petitioner turned to confront Ashworth to verify what Ashworth had said, respondent Newman snatched petitioner's handcuffs roughly and said, "Don't turn your Blackass around." Petitioner suffered extreme emotional and mental anguish and pain and suffering from those statements. When petitioner reached the segregation unit, he was strip

searched and placed in a segregation cell.

Shortly thereafter, respondent Ashworth served petitioner notice that he had been placed on temporary lockup status for violating DOC § 303.45, which prohibits the possession, manufacture and alteration of a weapon. The pending charges stemmed from allegations made over four months earlier that petitioner had possessed, manufactured and altered a weapon while confined in DS2 Cell #21.

On or around July 16, 2003, respondent Douma ordered that petitioner be put on two-officer escort and "lower trap bag; lunch" and "sharps" restrictions. The bag lunch restriction has caused petitioner to be hungry for several weeks because the food contained in the bags has been rotten, rancid, moldy or stale. Petitioner complained about the food to guards serving the meals and in inmate complaints, but his complaints were dismissed.

The "sharps" restriction has hindered petitioner's access to his hygiene supplies. Officers working the segregation units have either misplaced his supplies or ignored his requests. As a result of not being able to get his lotion and toothbrush and toothpaste, petitioner's skin has begun to dry out, crack and bleed and his gums have begun to bleed.

On approximately July 12 and 22, 2003, petitioner sent a request to the health services unit for a refill of his niacin prescription, which petitioner takes for high cholesterol. On July 22 and August 3, 2003, petitioner asked respondent Siedschlag for his medication. On or around July 26, 2003, petitioner submitted inmate complaint #CCI-2003-25853,

complaining that his prescription had not been refilled. As of August 20, 2003, petitioner had not received a satisfactory resolution to his complaint and his niacin prescription had not been refilled.

Respondent Kingston has reviewed and denied all of petitioner's complaints. Because petitioner is not getting his medication, he experiences sluggishness, headaches and hot flashes.

On August 3, 2003, petitioner was found guilty of violating DOC § 303.45. He was given a penalty of 8 days' adjustment segregation, 360 days' program segregation and restitution for glasses. The conduct report was fabricated and the guilty finding was erroneous and arbitrary. Petitioner appealed the guilty finding to respondent Kingston, who denied the appeal on August 21, 2003. On August 24, 2003, petitioner filed a certiorari action in Columbia County Circuit Court regarding the conduct report. That action is still pending.

DISCUSSION

I understand petitioner to be alleging that 1) respondents Ashworth and Newman violated his equal protection rights under the Fourteenth Amendment by making racial slurs; and 2) respondent Ashworth violated his right under the Eighth Amendment to be free from cruel and unusual punishment when he spit on petitioner; 3) respondents Ashworth and

Newman violated petitioner's right to procedural due process under the Fourteenth Amendment by placing him in temporary lockup; 4) respondents Douma and Kingston violated his Eighth Amendment rights by imposing bag lunch and "sharps" restrictions that threaten his health and retaining the restrictions; 5) respondents Siedschlag and Kingston were deliberately indifferent to petitioner's serious medical needs in violation of the Eighth Amendment when they failed to see that he got his prescription medication; and 6) respondent Kingston violated petitioner's due process rights by concurring in the finding of guilt on petitioner's conduct report charging a violation of DOC § 303.45. I will address each of petitioner's claims in turn.

A. Racial Remarks and Spitting

Racism in any form is reprehensible. Although prisoners are expected to endure many "harsh" and "restrictive" conditions as "part of the penalty . . . for their offenses," Rhodes v. Chapman, 452 U.S. 337, 347 (1981), they should not be expected to endure bigotry and intolerance. See Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y. 1991) ("Racism is never justified; it is no less inexcusable and indefensible merely because it occurs inside the prison gates.")

Nevertheless, not all racial insensitivity violates the Constitution. The Court of Appeals for the Seventh Circuit has held that even when a prison official uses racially

derogatory language, "verbal harassment does not constitute cruel and unusual punishment, deprive a person of a protected liberty interest or deny a prisoner equal protection of the laws." DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000). Accordingly, I must deny petitioner leave to proceed on his claim that respondents Ashworth and Newman violated his constitutional rights by using racial derogatory language.

As to the spitting incident, "[t]he Eighth Amendment's cruel and unusual punishments clause prohibits the 'unnecessary and wanton infliction of pain,'" Outlaw v. Newkirk, 259 F.3d 833, 837 (7th Cir. 2001), but not the "de minimis use of physical force." Id. at 838. A minor injury strongly suggests that the force applied is de minimis. Id. at 839. Although Ashworth's conduct is reprehensible and would constitute a battery, see, e.g., United States v. Taliaferro, 211 F.3d 412, 415 (7th Cir. 2000) (citing United States v. Masel, 563 F.2d 322, 324 (7th Cir. 1977) ("It is ancient doctrine that spitting upon another person is battery.")), petitioner fails to allege a physical injury resulting from Ashworth's action. In fact, petitioner attributes his emotional and mental anguish as well as pain and suffering to the racial remarks spoken by Ashworth and Newman, not to the spitting. "Not every 'malevolent touch by a prison guard' gives rise to a federal cause of action, even if the use of force in question 'may later seem unnecessary in the peace of a judge's chambers.'" Id. (citing Hudson v. McMillian, 503 U.S. 1, 9 (1992)). I will deny petitioner leave to proceed on his claim that respondent Ashworth used excessive force when he spit chewing

tobacco on petitioner's pants.

B. Due Process

A claim that government officials violated due process requires proof of both inadequate procedures and interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty)

The fact that petitioner was placed in temporary lockup without a hearing does not implicate a liberty interest. Wisconsin prisoners have no liberty interest in remaining free from temporary lockup. Russ v. Young, 895 F.2d 1149, 1154 (7th Cir. 1989) (holding that being placed in temporary lockup does not implicate liberty interest). Because petitioner has no federally enforceable right to due process before being held in such detention, he had no

due process claim against respondents for the alleged lack of review of his confinement in temporary lockup prior to a hearing and the imposition of restrictions during the lockup. After Sandin, in the prison context, state-created protected liberty interests are limited essentially to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. See Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). Petitioner does not allege that he was held in lockup for a period that exceeded the remaining term of his incarceration. Therefore, petitioner has failed to allege facts showing that his placement in temporary lockup violated a liberty interest.

Similarly, a liberty interest is not implicated by respondent Kingston's act of upholding the disciplinary committee's finding of guilt on the conduct report charging petitioner with a violation of DOC § 303.45. Petitioner's penalty for violating the rule was 8 days' adjustment segregation, 360 days' program segregation and restitution for glasses. Under Sandin, this disciplinary penalty does not constitute an atypical or significant hardship in relation to the ordinary incidents of prison life. Petitioner will be denied leave to proceed on his procedural due process claims against respondents Kingston, Ashworth and Newman because the claims are legally frivolous.

C. Bag Lunch and Sharps Restrictions

As noted earlier, the Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because the Eighth Amendment draws its meaning from evolving standards of decency in a maturing society, there is no fixed standard to determine when conditions are cruel and unusual. Id. at 346. The Court of Appeals for the Seventh Circuit has found Eighth Amendment violations when, for example, an inmate was tied to a bed for nine days, had to use a urinal pitcher which was then left full by his bed for two days, had no change of linen or clothes for that period, had no silverware and had to eat with his hands, and had no opportunity to exercise. Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985). However, 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). Petitioner's allegations that he was hungry for weeks because he was served inedible food and that he could not properly care for his skin and teeth state an arguable basis for a claim that his Eighth Amendment rights were violated. See, e.g., French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985) (state must provide "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who

consume it."); but see Drake v. Velasco, 207 F. Supp. 2d 809, 812 (N.D. Ill. 2002) (noting that a constitutional deprivation did not occur because plaintiff did "'not allege that he consumed the tainted food, required treatment by the paramedics dispatched to the area, or that he became sick or nauseated.'") (quoting Miles v. Konvalenka, 791 F. Supp. 212, 214 (N.D. Ill. 1992)); see also Penrod v. Zavaras, 94 F.3d 1399, 1406 (10th Cir. 1996) (plaintiff raised a genuine issue of material fact whether prison officials' alleged denial of hygienic items caused plaintiff serious harm when his gums started to bleed). Petitioner will be allowed leave to proceed on this claim against respondents Douma and Kingston.

D. Denial of Prescription Medication

Petitioner alleges that respondents Siedschlag and Kingston failed to insure that he received his prescription medication for high cholesterol while he was being held in the segregation unit and that the lack of medication caused him to suffer symptoms of sluggishness, headaches and hot flashes.

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 must allege 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). Id. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). 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. Gutierrez, 111 F.3d at 1371. 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. 825, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Snipes, 95 F.3d at 590-91. Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

The deliberate refusal to provide an inmate with prescribed medication can violate the Eighth Amendment. Walker v. Benjamin, 293 F.3d 1030, 1040 (7th Cir. 2002).

Petitioner alleges that respondents Siedschlag and Kingston were deliberately indifferent to his serious medical needs when they refused to refill his niacin prescription. At the time he filed complaint #CCI-2003-25853, petitioner had not been given his medication for over a month. These allegations are sufficient to state an Eighth Amendment claim against respondents Siedschlag and Kingston that they were deliberately indifferent to petitioner's serious medical needs.

ORDER

IT IS ORDERED that

1. Petitioner Tonie Curtis Cotton may proceed against respondents Kingston and Douma on his claim that he was denied adequate nutrition and his health was threatened by the "sharps' restriction imposed upon him;

2. Petitioner may proceed against respondents Siedschlag and Kingston on his claim that these respondents were deliberately indifferent to his serious medical needs by failing to give him the niacin prescribed for his high cholesterol;

3. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claims that respondents Ashworth and Newman violated his constitutional rights by using racial slurs, that respondent Ashworth used excessive force in violation of the Eighth Amendment when he spit chewing tobacco on petitioner, that respondents Ashworth and Newman

violated petitioner's due process rights by placing him in temporary lockup and that respondent Kingston violated his due process rights by affirming the finding of guilt on petitioner's conduct report. These claims are DISMISSED pursuant to 28 U.S.C. § 1915A(b)(2) as without legal merit.

4. Respondents Ashworth and Newman are DISMISSED from this case; and

5. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the respondents, he should serve the lawyer directly rather than respondents. The court will disregard documents petitioner submits that do not show on the court's copy that he has sent a copy to respondents or to respondents' attorney.

6. Petitioner 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.

7. The unpaid balance of petitioner's filing fee is $150.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2) at such time

as he has the means to do so.

Entered this 20th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge