IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHON M. MARK,

ORDER

Plaintiff,

03-C-516-C

v.

OFFICERS OLSON; HAGLIN; HARSMA GRANTON'S 1ST, 2ND, and 3RD SHIFT OFFICERS BETWEEN THE DATES OF 7-29-02 AND 8-13-02; SGT. MESHUN; SGT. McAURTHER; MRS. TEGELS; MR. DOUGHERTY; LT. BENGAL; LT. DOHMS; LT. JOHNSON; LT. (JANE DOE); MEDICAL STAFF BETWEEN 7-15-02 TO 9-15-02 (JOHN AND JANE DOES),

Defendants.

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This is a civil action for declaratory, monetary and injunctive relief, brought pursuant to 42 U.S.C. §§ 1983 and 1985. Plaintiff Jonathon Mark, who is currently confined at the Milwaukee Secure Detention Facility in Milwaukee, Wisconsin, alleges that defendants have violated his constitutional rights in numerous ways: (1) an unnamed doctor and nurse violated his Eighth Amendment right to adequate medical treatment when they refused to x-ray his foot after it was "crushed" in a work-related accident; (2) defendants McAurther,

Meshun and Tegels breached their duty to protect plaintiff under the Eighth Amendment when they placed an inmate with a highly contagious disease in his cell; (3) an unknown defendant or defendants violated plaintiff's Eighth Amendment right to adequate medical care and his Fourteenth Amendment right to equal protection of the laws when they denied plaintiff a hepatitis test because of his race; (4) various defendants violated plaintiff's right to due process under the Fourteenth Amendment when they failed to provide him with a fair hearing after he was accused of having contraband and placed in segregation; (5) defendants Bengal, Dohms, Doherty and Johnson took various actions against plaintiff because of his race and because he exercised his constitutional rights to free speech and to access the courts; and (6) defendants Olson, Haglin and Harsma searched his cell more often that other inmates because of his race.

Although plaintiff has paid the filing fee in full, because he 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, a 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.

I conclude that plaintiff has stated a claim upon which relief may be granted on his

claims that he was subjected to a substantial risk of serious harm to his health when defendants Meshun, McAurther and Tegels knowingly placed him in the same cell as someone with a highly contagious disease and when an unknown defendant or defendants denied him a hepatitis test. In addition, plaintiff has alleged the bare minimum of facts necessary to put defendants on notice of his claims that he received differential treatment because of his race and was retaliated against for exercising his right to free speech and his right to access the courts. Therefore, plaintiff will be allowed to proceed on these claims. For the reasons discussed below, plaintiff's remaining claims will be dismissed.

ALLEGATIONS OF FACT[1]

Plaintiff is an inmate at the Milwaukee Secure Detention Facility, in Milwaukee, Wisconsin. During the events at issue in this case, he was an inmate at the Jackson Correctional Institution in Black River Falls, Wisconsin. He is Native American.

[1] I note that plaintiff filed with the court numerous copies of his complaint, presumably so that they could be forwarded to the defendants. However, attached to only one of the copies were numerous documents that appear to relate to plaintiff's exhaustion of administrative remedies. Because failure to exhaust administrative remedies is an affirmative defense, I have not considered these documents in screening the complaint. Further, because these documents are attached to only one copy of his complaint, I presume that plaintiff did not intend the documents to be forwarded to the defendants as part of the complaint.

A. Foot Injury

Plaintiff was employed in the maintenance department at the prison. On August 29, 2002, while he was working, plaintiff's foot was crushed in a hydraulic lift. Plaintiff heard a crunching sound and told the officer in charge that he believed his foot was broken. Plaintiff was taken to the health services unit, where a nurse gave him a tetanus shot. Plaintiff told the doctor what had happened and repeated that he believed his foot was broken. He asked for his foot to be x-rayed, but the doctor told him that he could not x-ray the foot because there was too much swelling. The doctor put cream on plaintiff's foot, covered it with a band aid, prescribed 600mg of ibuprofen and gave plaintiff a pair of crutches. He told plaintiff that he did not believe there was any serious damage to the Achilles tendon. In addition, he said that if plaintiff still had serious pain after three days, he should write to the health services unit and request an x-ray.

The pain did not go away after three days, so plaintiff returned to the health services unit. A nurse examined his foot. She determined that there was nothing wrong with his foot and that an x-ray was unnecessary.

Plaintiff returned to work after one week because he was worried he might lose his job; he wanted his supervisor to know that he was a good worker. Plaintiff believes that he now has a "life-long injury" that will prevent him from playing professional tennis when he is released from prison because his "front to back" movement has been impaired.

B. Cell Assignment

On July 16, 2003, defendants Meshun, McAurther and Tegels placed inmate A.W.[2] plaintiff's cell. Soon after, A.W. told plaintiff that he had been diagnosed with hepatitis B and hepatitis C. Fearing for his safety, plaintiff spoke with two correctional officers, defendants Olson and McAurther, about the possibility of being moved to a different cell. Plaintiff told the officers that he was in danger so long as he was sharing a cell with A.W. Defendant McAurther told plaintiff that he did not have the authority to change cell assignments. This was not true; McAurther had the authority to move inmates within the unit. McAurther directed plaintiff to speak with the unit manager, defendant Tegels.

Plaintiff spoke with his sister and two other inmates after being rebuffed by defendant McAurther. Each of them told plaintiff that hepatitis was very contagious and that it was not safe for plaintiff to share a room with A.W. Plaintiff became more fearful.

The following day, plaintiff went to the officer's station, stating that he needed to speak with the unit manager because he had a medical emergency. A social worker who was walking through the unit told plaintiff to contact the health services unit. Plaintiff followed these instructions, writing a request to be moved because he did not want to contract

[2] Plaintiff identifies A.W. by his full name in his complaint. However, because plaintiff's allegations concern sensitive medical information pertaining to A.W., I have chosen to use his initials instead of his full name.

hepatitis. Plaintiff believed he had been infected because he had touched a pair of A.W.'s underwear that was covered in feces. When he informed "staff" what happened, they did nothing.

Plaintiff had a conversation with A.W. about hepatitis. After confessing to plaintiff that he had given the disease to his son, A.W. became agitated, proclaiming that he was going to infect women with hepatitis after he was released from prison. Plaintiff became more afraid.

Defendants Meshun, McAurther and Tegels knew that A.W. had hepatitis when they placed him in plaintiff's cell.

C. Request for Hepatitis Test

While sharing a cell with A.W., plaintiff requested a test for hepatitis. Plaintiff's request was denied, even though he had enough money in his account to pay for the test. The medical staff wrote, "You were checked for Hepatitis on Feb. '02, the test came back 'negative.' Do you really think you've been exposed to Hepatitis?" Plaintiff believes that the medical staff was denying him the test because he is Native American. Plaintiff is aware of no other inmate that has been denied a similar request. Plaintiff sent the health services unit a second request for a hepatitis test. A week later, his request was denied again, even though the medical staff knew that A.W. had hepatitis.

D. Placement in Temporary Lock Up

One night in his cell, plaintiff noticed something shiny in A.W.'s hand. Plaintiff though it was a "polished metallic object," but could not discern what it was exactly and he did not ask. Later, however, he became concerned and gave defendant Olson a slip stating that he thought there was a razor blade in his cell. Prison staff performed a search of the cell that evening. After the search, defendants Bengal, McAuthur and Harsma spoke with plaintiff privately. They told him that the officers who searched the cell had found a razor blade under plaintiff's mattress. Plaintiff denied that the razor blade was his. Defendant Bengal told plaintiff that unless A.W. took responsibility for the razor blade, both he and A.W. would be placed in segregation. When A.W. denied responsibility as expected, plaintiff and A.W. were placed in temporary lock up. (Temporary lockup is a "nonpunitive segregated status allowing an inmate to be removed from the general population pending further administrative action. Wis. Admin. Code. § 303.02(22) (May 2003).)

A.W. was released from temporary lock up after four days but plaintiff was not. Plaintiff believes that one reason he was placed in segregation and given harsher treatment than A.W. was a complaint plaintiff had made about the volunteer who performed religious services for Native American inmates. At the beginning of each service, the volunteer would read passages from the Bible. Plaintiff was offended by the practice and expressed his feelings to another Native American, "Greendeer." When Greendeer raised the issue with

the volunteer at the next service, the volunteer responded that he would not come unless he could read from the Bible. Plaintiff wrote a letter to the Ho-Chunk Nation, informing it of the situation.

Defendant Bengal heard about the incident and knew that plaintiff was involved. Bengal put plaintiff in temporary lock up because of this incident and because he is prejudiced against Native Americans.

While in segregation, plaintiff sent the security director two letters asking why he was still in temporary lockup. In response to the second letter, the security director wrote that a review of plaintiff's status was being performed.

After 20 days, plaintiff was given a hearing. Although he requested four witnesses, he was limited to two, so he picked defendants Bengal and Meshun. When plaintiff called the witnesses at the hearing, defendant Dohms, who was presiding over the hearing, acted as though he did not know that plaintiff would be calling witnesses. However, Dohms had known about the witnesses for two weeks. He chose to delay the hearing and prolong plaintiff's confinement in segregation in retaliation for plaintiff's complaint about the religious service volunteer.

Plaintiff believed that he would be released from segregation after 21 days because that is the time limit under the regulations for temporary lock up unless the warden authorizes additional time. Plaintiff explained this to the guards on duty and a sergeant, but

he was not released. Throughout the weekend, plaintiff continued to send messages to the shift sergeants. Finally, defendant Dohms told plaintiff that his hearing had been continued and the 21-day limit did not apply.

The hearing reconvened the following day. Although plaintiff submitted 18 questions for defendant Bengal, defendant Dohms permitted only three of them. Before Bengal answered the third question, plaintiff was taken out of the room for five minutes. Plaintiff believes that this was done to prepare Bengal's answer outside plaintiff's presence. Plaintiff asked Bengal whether he had any facts to support his belief that plaintiff had hidden the razor blade in the mattress in order to force a room change. Bengal's response was "even-toned" and "quick." (Plaintiff does not allege any facts about the substance of Bengal's answer.) At the end of the hearing, the charges against plaintiff were dismissed and he was released into the general prison population. He was not placed in a cell with A.W.

Some time later, plaintiff was placed in temporary lock up again. Although at first plaintiff was questioned by the unit manager, defendant Doherty, about a razor that was found in the bathroom, defendant Johnson told plaintiff that he needed to go into "protective custody" because he might be in danger. Defendant Dohms authorized plaintiff's placement in segregation. Two days later, plaintiff received notice that he was being investigated for gambling. Plaintiff was released into the general population after approximately one week. Defendants Dohms, Johnson and Doherty conspired to place

plaintiff in temporary lock up because they believed that plaintiff had not gotten anything out of his first placement in segregation, because plaintiff is Native American, because plaintiff wrote two inmate complaints about his first placement in temporary lock up and because he wrote letters complaining about his situation to various prison officials.

E. Cell Searches

After plaintiff's first placement in segregation, defendants Olson and Haglin began searching his cell every week, which is twice as often as other cells. Sometimes they searched his cell twice in one day. When they searched his cell, they left everything in disarray. No contraband was ever found in any of these searches. Olson and Haglin targeted plaintiff because he is Native American and because they believed he was not sufficiently punished for having a razor blade.

DISCUSSION

A. Medical Treatment for Plaintiff's Foot

I understand plaintiff to allege that an unnamed doctor and nurse violated his Eighth Amendment right to receive adequate medical care when they refused to his x-ray his foot after it was "crushed" in a hydraulic lift. 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). 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").

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").

I cannot reasonably infer from plaintiff's allegations that either the unnamed doctor or the nurse was deliberately indifferent to a serious medical need of plaintiff. With respect to the doctor, plaintiff alleges that the doctor told him that he *could not* x-ray his foot at the time because there was too much swelling. He gave plaintiff some cream and a pair of crutches, prescribed medication for his pain and told him to return in three days for an x-ray if his pain did not subside. Both the Supreme Court and the Court of Appeals for the Seventh Circuit have made clear that the failure to give an x-ray does not state a claim under the Eighth Amendment if the inmate was provided with other treatment showing the

defendant's good faith efforts. Estelle, 429 U.S. at107 (where medical personnel saw inmate 17 times in 3 months and treated back strain with bed rest, muscle relaxants and pain relievers, their failure to x-ray his broken back or implement other diagnostic techniques or treatment was not deliberate indifference); Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508 (7th Cir. 1999).

Plaintiff suggests in his complaint that the doctor should have ordered that x-rays be taken if plaintiff's pain did not diminish. Plaintiff writes, "This raises the standard to malpractice, which is pretty much the same thing as deliberate indifference." Plaintiff is incorrect. Even if the doctor's actions could support a claim for malpractice, the case law is clear that the standard for showing an Eighth Amendment violation is more demanding than the one for medical malpractice. See Estelle, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); Williams v. O'Leary, 55 F.3d 320, 324 (7th Cir.1995) (failure to carefully review medical history and prescribe appropriate antibiotic equals malpractice, not deliberate indifference, where prisoner received some treatment).

With respect to the nurse, plaintiff alleges only that she looked at his heel and decided there was nothing wrong and that x-rays wouldn't be taken. It is well-established that a difference of opinion about the appropriate course of treatment is insufficient to show an Eighth Amendment violation. See Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th

Cir. 1996). Even if the nurse was deliberately indifferent to plaintiff's health, plaintiff alleges no facts from which it could be inferred that he had a serious medical need at the time, except for his pain, which was already being treated with pain medication. Plaintiff alleges that he was able to go back to work in one week; he does not allege that doing so caused him any pain or exacerbated his condition. Perhaps if plaintiff's pain had persisted for an extended period, defendants would be required to do more than prescribe ibuprofen. However, the only long term effect alleged by plaintiff is that he believes he will not be able to play professional tennis when he is released because his "front to back movement" has been impaired. Even if true, this allegation does not support a claim that the nurse was deliberately indifferent to a serious medical need. Prison officials are required to provide inmates with the "minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). They do not have to insure that inmates are able to compete successfully in professional sports. Although plaintiff's physical limitations may be disappointing or even upsetting to him, they do not provide a basis for a claim under 42 U.S.C. § 1983. Accordingly, plaintiff's claim that an unnamed doctor and nurse violated his right to adequate medical treatment under the Eighth Amendment will be dismissed for failure to state a claim upon which relief may be granted.

B. Cell Assignment

Plaintiff alleges that defendants Meshun, McAurther and Tegels violated his Eighth Amendment rights when they placed him in the same cell as someone they knew had been diagnosed with hepatitis B and hepatitis C. The Eighth Amendment provides prison inmates with the right to "human conditions of confinement." Farmer 511 U.S. at 832. Prison officials violate this right when they are deliberately indifferent to a substantial risk of serious harm to an inmate's health or safety. Peate v. McCann, 204 F.3d 879, 882 (7th Cir. 2002).

The Eighth Amendment's requirements include a duty to protect inmates from harm by other inmates. Boyce v. Moore, 314 F.3d 884, 888 (7th Cir. 2002) (citing Farmer, 511 U.S. at 832-33). For example, in Case v. Ahitow, 301 F.3d 605 (7th Cir. 2002), the plaintiff, Bryan Case, was an inmate who was attacked by another inmate, Jones. Jones had an extensive history of violent behavior both in and out of prison. Case presented evidence that Jones had repeatedly threatened to assault and kill him before the attack. Although he wrote to various prison officials about these threats, defendants placed Case in the same wing as Jones, where they would share a dining room and other facilities. The court concluded that these facts were sufficient to support a claim under the Eighth Amendment because there was "evidence that the defendants knew that Jones posed a serious danger to Case, and they could have averted the danger easily" by placing either Jones or Case in a different wing of the prison. Id. at 607.

The circumstances do not have to be as egregious as they were in Case to state a claim under the Eighth Amendment, see Helling v. McKinney, 509 U.S. 25 (1993) (prisoner stated claim under Eighth Amendment when he alleged that he was forced to share cell with five-pack-per-day smoker), but in all cases, the plaintiff must allege facts from which it may reasonably be inferred that he was subjected to a substantial or unreasonable risk of harm. Id. at 35.

Certainly, in some cases, the risk of harm in placing a healthy inmate in the same cell as one with a communicable disease would be significant enough to be considered cruel and unusual punishment. If A.W. had a history of violent behavior or was threatening to give plaintiff the disease and defendants knew this, they could be liable for placing plaintiff with A.W. Cf. Massick v. North Central Correctional Facility, 136 F.3d 580 (8th Cir. 1998) (sharing cell with HIV-positive inmate who was bleeding could subject healthy inmate to substantial risk of harm). Similarly, if the disease was one that could be acquired simply by breathing the same air as one already infected, plaintiff would have a right to be segregated from any carriers. See Loftin v. Dalessandri, 3 Fed. Appx. 658, 659 (10th Cir. 2001) (prisoner stated a claim under Eighth Amendment by alleging that defendants placed him in same cell as two inmates who had tested positive for tuberculosis, a disease that is "spread through the air when a person with TB coughs or sneezes"). Finally, the risk of exposure could become intolerably high if there was severe overcrowding and unsanitary conditions

at the prison. See Hutto v. Finney, 437 U.S. 678 (1978).

Plaintiff alleges that hepatitis is extremely contagious and that sharing a cell with A.W. subjected him to a substantial risk of serious harm to his health. At this stage of the proceedings, I must accept all plaintiff's allegations as true. If A.W.'s disease was as dangerous as plaintiff alleges and defendants Meshun, McAurther and Tegels knew this when they placed A.W. in plaintiff's cell, they may have been deliberately indifferent to plaintiff's health. Accordingly, I will allow plaintiff to proceed on this claim against defendants Meshun, McAurther and Tegels.

However, plaintiff should be aware that he will not be able to rest on his allegations in later stages of this case. Although the Constitution does not prohibit prison officials from segregating prisoners with hepatitis or similar communicable diseases from the general prison population, Anderson v. Romero, 72 F.3d 518, 526 (7th Cir. 1995), courts agree that the Constitution also does not require segregation in all cases. See, e.g, Glick v. Henderson, 855 F.2d 536, 539 (8th Cir. 1998) (prison's failure to segregate inmates with HIV/AIDS did not violate Eighth Amendment); Oladipupo v. Austin, 104 F. Supp. 2d 626, 635 (W.D. La. 2000); Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 267 (S.D.N.Y. 1990). Therefore, plaintiff will have to come forward with medical evidence that there was a substantial risk that he could contract A.W.'s illness simply by sharing a living space with him and that A.W.'s illness was sufficiently severe to constitute a serious medical need.

Evidence of the belief of his family or other inmates will not be sufficient to show this unless they qualify as medical experts. In addition, he will have to show that defendants *knew* of a substantial risk to plaintiff's health, but decided to place A.W. in plaintiff's cell anyway.

C. Refusal to Provide Test for Hepatitis

Plaintiff alleges that defendants were deliberately indifferent to his serious medical needs when they refused to provide him with a hepatitis test. In addition, he alleges that he was denied the test because he is Native American.

In some circumstances, the Eighth Amendment could entitle an inmate to be tested for a particular disease. If there is a substantial risk that an inmate was exposed to a serious disease and testing could aid in treating it, prison officials could violate contemporary standards of decency by refusing to provide the test. Plaintiff alleges that he was exposed to a serious, contagious illness. At this point, I will assume that failing to treat hepatitis will lead to further serious health consequences and that the medical staff knew this. Accordingly, I conclude that plaintiff has stated a claim under the Eighth Amendment.

Further, even if defendants could have denied plaintiff the test for other reasons, the equal protection clause of the Fourteenth Amendment would prohibit medical staff from denying him a test because of his race, at least if they did not have a legitimate penological

reason for the differential treatment. Plaintiff's only basis for believing he was the victim of discrimination is an allegation that he is aware of no other inmate that has been denied such a request. Even if true, this allegation would not be sufficient to prove plaintiff's equal protection claim. See Minority Police Officers Association v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986) ("We have previously stated that the conclusory allegations of generalized racial bias do not establish discriminatory intent."). Before a finder of fact could infer discriminatory intent, at a minimum plaintiff would have to present credible evidence showing that other non-Native American inmates were given a hepatitis test *and* that they were similarly situated to him, that is, that there were no relevant differences between them and plaintiff apart from their race.

However, in order to state a claim, the complaint does not need to contain "all of the facts that will be necessary to prevail." Hoskins v. Poelestra, 320 F.3d 761, 764 (7th Cir. 2003). Under Fed. R. Civ. P. 8, the "plaintiff is not required to plead facts or legal theories or cases or statutes, but merely to describe his claim briefly and simply." Shah v. Inter-Continental Hotel Chicago Operating Corp., 314 F.3d 278, 282 (7th Cir. 2002); see also Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002) ("[T]here is no requirement in federal suits of pleading the facts or the elements of a claim."). So long as the complaint gives the defendant sufficient notice of the claim to file an answer, it "cannot be dismissed on the ground that it is conclusory or fails to allege facts." Higgs v. Carver, 286 F.3d 437,

439 (7th Cir. 2002).

In this case, plaintiff has identified the discriminatory act (refusing to provide a hepatitis test) and the basis for the discriminatory treatment (his status as a Native American). This is sufficient to state a claim. Antonelli v. Sheehan, 81 F.3d 1422, 1433 (7th Cir. 1996) (because plaintiff "suggests discriminatory motives impelled discriminatory treatment of him, he has stated an equal protection claim."). However, I emphasize that plaintiff will need much more evidence to succeed on his claim. If plaintiff chooses to rest on the allegations in his complaint, this claim will not survive a motion for summary judgment.

Another issue that must be addressed is plaintiff's failure to identify the individual or individuals who denied his request. Apparently, plaintiff received only a written denial that was not signed. Thus, in the caption of his complaint, plaintiff names as defendants "Medical Staff Between 7-15-02 to 9-15-02 (John and Jane Does)." When a pro se litigant fails to identify a defendant by name in his complaint, a district court may not dismiss the claim but must provide the plaintiff with an opportunity to amend his complaint. Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555-56 (7th Cir. 1996). Accordingly, I will allow plaintiff to proceed against the unnamed defendants for the time being. Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties

the most efficient way to obtain identification of the unnamed defendant or defendants and will set a deadline within which plaintiff is to amend his complaint to replace the Doe defendants.

D. Disciplinary Hearings

Plaintiff has identified numerous perceived deficiencies in the procedures he was given when he was placed in temporary lock up on two different occasions: an inadequate investigation, insufficient proof of his guilt, lack of notice and various other problems. Unfortunately for plaintiff, prisoners are not always entitled to procedural safeguards, even when a decision may affect them adversely.

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." 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).

It is clear from plaintiff's complaint that his confinement in temporary lock up did not exceed his prison sentence. In light of Sandin and Wagner, I cannot conclude that plaintiff's placement in segregation implicated a liberty interest. In the absence of a liberty interest, "the state is free to use any procedures it chooses, or no procedures at all." Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001). Therefore, plaintiff's claim that he was denied due process will be dismissed as legally frivolous.

E. Retaliation/Disparate Treatment

Plaintiff alleges that defendant Bengal placed him in segregation and kept him there longer than A.W. for two reasons: because he is Native American and because Bengal knew about plaintiff's "involvement" in complaints about the volunteer who performed religious

services for Native Americans. In addition, he alleges that defendant Dohms prolonged his first placement in segregation because of the incident with the volunteer. Finally, he alleges that Dohms, Doherty and Johnson entered into a conspiracy to place him in segregation a second time because he is Native American, because he filed inmate complaints and because he wrote letters complaining about his placement to various prison officials. See 42 U.S.C. § 1985(3) (creating cause of action when two or more people conspire to deprive another of equal protection of the laws). I understand plaintiff to be contending that these defendants denied him equal protection of the laws under the Fourteenth Amendment and retaliated against him for exercising his right to free speech under the First Amendment and his right to access the courts.

Again, plaintiff provides virtually no basis for his belief that he was discriminated against because of his race. However, as noted above, this is unnecessary in order to state a claim. Because plaintiff has provided defendants with sufficient notice to enable them to file an answer, plaintiff will be allowed to proceed on these claims.

To succeed on a claim that defendants Bengal, Dohms, Doherty and Johnson retaliated against him for exercising a constitutional right, plaintiff will have to show both that he engaged in constitutionally protected behavior and that his behavior was a substantial or motivating factor in their adverse treatment of him. Rasche v. Village of Beecher, 336 F.3d 588, 597 (7th Cir. 2003). There is no question that the First

Amendment protects the right to raise concerns about the nature of religious services held in the prison. In addition, plaintiff has a constitutional right to file nonfrivolous inmate complaints and to complain about his prison conditions. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002).

Plaintiff's involvement in raising the concerns about the religious service volunteer appears to be minimal. He does not allege that he complained to Bengal, Dohms or any other prison official about the volunteer. His conversations were with another prisoner, who then complained directly to the volunteer about the volunteer's use of the Bible. Although plaintiff does allege that he wrote a letter to the Ho-Chunk Nation about the incident, he does not say how Bengal would have known about this. Plaintiff also fails to explain why, if Dohms were harboring animus against him, Dohms would dismiss the charges against plaintiff relating to the razor blade.

Despite the implausibility of plaintiff's allegations, I may not weigh plaintiff's evidence at this stage of the litigation or dismiss his claim on the ground that his allegations would be insufficient to sustain his claim at the summary judgment stage. To state a claim for retaliation, plaintiff need only identify the retaliatory act of the defendant and the constitutionally protected behavior that prompted the retaliation. See Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). Plaintiff has done this. Accordingly, I will allow him to proceed on these claims.

I emphasize that plaintiff has an uphill battle on each of these claims. The allegations in his complaint come nowhere close to showing that defendants' actions were motivated either by plaintiff's race or his speech. Plaintiff should keep in mind that it will not matter that he *believed* that the actions were motivated by one or both of these factors. Sanderson v. Henderson, 188 F.3d 740, 746 (7th Cir. 1999) (evidence of plaintiff's belief that defendant's decision was motivated by discriminatory intent insufficient to survive a motion for summary judgment). Plaintiff will have to come forward with *evidence* that defendants took plaintiff's race or his speech into consideration when placing him in temporary lock up and holding him there longer than A.W. Further, with respect to his claim against defendant Bengal, it will not be enough for plaintiff to show that Bengal was *mistaken* in believing that plaintiff rather than A.W. was responsible for the razor. Rather, plaintiff will have to show that Bengal's explanation was a lie or that his belief had no basis in fact but instead was a result of discriminatory attitudes held toward Native Americans.

F. Cell Searches

Plaintiff alleges that defendants Olson and Haglin searched his cell more often than other inmates because plaintiff is Native American. The Supreme Court has held that prison officials may search an inmate's cell at random without violating the Fourth Amendment

because prisoners have no reasonable expectation of privacy in their cells. Hudson v. Palmer, 468 U. S. 517, 519-20 (1984). Again, however, the equal protection clause of the Fourteenth Amendment would prohibit defendants from singling plaintiff out for harsher treatment because of his race. As with plaintiff's other equal protection claims, I am highly skeptical that plaintiff will be able to prove that he was being treated differently because he is Native American. Nevertheless, plaintiff's allegations are sufficient to state a claim under the liberal notice pleading standards of Fed. R. Civ. P. 8. Accordingly, plaintiff will be allowed to proceed on his claim that defendants Olson and Haglin denied him equal protection of the laws when they subjected him to more searches than other inmates because of his race.

ORDER

IT IS ORDERED that

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

(1) a yet to be named defendant or defendants "Medical Staff Between 7-15-02 to 9-15-02 (John and Jane Does)" violated his rights to adequate medical treatment and to equal protection of the laws by refusing to provide plaintiff with a hepatitis test because of his race;

(2) defendants Meshun, McAurther and Tegels breached their duty to protect plaintiff under the Eighth Amendment when they placed him in the same cell as another inmate who had been diagnosed with hepatitis;

(3) defendant Bengal placed plaintiff in segregation and kept him there longer than his cell mate because plaintiff is Native American and in retaliation for plaintiff's exercise of his right to free speech;

(4) defendant Dohms prolonged plaintiff's placement in segregation in retaliation for plaintiff's exercise of his right to free speech;

(5) defendant Dohms, Doherty and Johnson entered into a conspiracy to place plaintiff in segregation a second time because he is Native American and because he exercised his right to free speech and to access the courts;

(6) defendants Olson and Haglin searched plaintiff's cell more often than other inmates because he is Native American.

2. The following claims are DISMISSED for failure to state a claim or on the ground that they are legally frivolous:

(1) an unnamed doctor and nurse violated his Eighth Amendment right to receive adequate medical care when they refused to x-ray his foot after it had been injured;

(2) various defendants violated plaintiff's right to due process under the Fourteenth Amendment by failing to provide him a fair disciplinary hearing.

3. Because plaintiff has not a stated a claim upon which relief may be granted against defendants Harsma, "Lt. (Jane Doe)" and "Granton's 1st, 2nd and 3rd Shift Officers between the dates of 7-29-02 and 8-13-02," these defendants are DISMISSED from the case.

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

5. 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 21st day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge