IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LUIS A. RAMIREZ,

ORDER

Petitioner,

04-C-335-C

v.

GARY R. McCAUGHTRY, MATTHEW FRANK, CURT JANSEN, STEVEN SCHUELER, MARC CLEMENTS and STEVEN CASPERSON,

Respondents.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Waupun Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. 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.

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). 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 Luis Ramirez is confined at the Waupun Correctional Institution. He has been housed in Waupun's segregation unit for the past three years. The adjustment committee has sentenced him to the segregation unit for punitive reasons. Respondent Gary McCaughtry is the warden at the Waupun Correctional Institution and is responsible for the actions of the following other respondents: 1) respondent Curt Jansen, who serves as the unit manager of the institution's segregation units; 2) respondent Steven Schueler, who is the

segregation unit supervisor; and 3) respondent Marc Clements, who is the security director at the institution and responsible for the security of the segregation unit. Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections. Respondent Steven Casperson is Administrator for the Department of Corrections and is responsible for the operation of each correctional institution.

During his confinement in the segregation unit for the past three years, petitioner has experienced the following unconstitutional conditions.

1. He must conduct legal research in a small room while handcuffed to a table. Respondents do not allow him to go to the law library. If petitioner required medical attention while in this room, he would be unable to push the emergency button as it is on the other side of the wall.
2. Petitioner is not allowed to go outside for physical activity, but must exercise inside a small, 10x12 foot cage with nothing inside it.
3. Petitioner is housed in cells that have feces, blood, food and urine on the floors and walls. Inmates in the segregation unit have AIDS, TB, hepatitis, and skin diseases that petitioner can contract. Institution staff bring cleaning supplies on Saturdays only.
4. Respondents leave the lights on in his cell 24 hours a day, depriving petitioner of sleep. Petitioner has not slept well in three years and is always tired and

sick.

5. In the summer, petitioner's cell is extremely hot, causing his headaches to worsen. Respondents do not provide him with a fan and give him only one 4 oz. cup of ice. In the winter petitioner's cell is freezing. Respondents do not provide him with extra blankets and the heating system does not work.

6. In the segregation unit, inmates are not allowed pictures, magazines, newspapers or personal books.

7. Respondents write "bogus" conduct reports to keep petitioner in the segregation unit.

Petitioner suffers mentally and physically from these conditions; living in the segregation unit is stripping him of his sanity. Petitioner confuses dreams with reality. As a result, petitioner needs clinical supervision but sees a nurse only once a week. Petitioner is unable to function normally around people. For example, petitioner went to Milwaukee County on February 13, 2003 and was charged with battery to law enforcement because he did not know what to do in the booking room around others. Furthermore, the cells in segregation have no mirrors or windows. Petitioner has complained about these conditions to each of the respondents but to no avail.

DISCUSSION

I. SCREENING UNDER § 1915

Petitioner contends that respondents are violating his Eighth, Fourteenth or First Amendment rights by 1) allowing him to be housed in the segregation unit for three years as the result of bogus conduct reports; 2) requiring him to conduct legal research in a small room while handcuffed; 3) requiring him to exercise indoors in a 10x12 foot, empty cage; 4) housing him in cells with feces, blood, food and urine on the floors and walls, thereby increasing his risk of his contracting AIDS, TB, hepatitis, and skin diseases; 5) leaving the lights on in his cell 24 hours a day, depriving him of sleep; 6) allowing cell temperatures to become extremely hot in the summer and freezing in the winter and not providing him with a fan or enough ice in the summer or with enough blankets in the winter; and 7) prohibiting him from having pictures, magazines, newspapers or personal books while in segregation.

I note that in the relief section of his complaint, petitioner lists a number of requests that imply violations that are unrelated to his factual allegations. For example, petitioner requests a court order requiring that inmates see a nurse daily, not just once a week, that control officers respond to the emergency call when inmates push the button and that inmates get visits through a glass window and not by television screen. Because petitioner has not alleged any facts relating to these requests, I am not addressing them.

A. Segregated Housing for Three Years

I understand petitioner to argue that respondents are violating his Eighth Amendment and Fourteenth Amendment due process rights by housing him in segregation for three years on "bogus" conduct reports. In addition, I understand him to contend that because the cells have no mirrors or windows and are filthy, the exercise facility is small, the lights are left on and the temperatures fluctuate wildly, it is a violation of the Eighth Amendment for him to be kept in them.

Petitioner appears to be attempting to allege facts similar to those raised in Jones 'El v. Berge, No. 00-C-421-C (W.D. Wis. 2003). In that case, I allowed the inmates at the Wisconsin Secure Program Facility (then known as the Supermax Correctional Institution) to proceed as a class on a claim that their combined conditions of confinement subjected them to social isolation and sensory deprivation. The plaintiffs alleged that many of their conditions had a "mutually enforcing effect that produce[d] the deprivation of a single identifiable human need," Wilson v. Seiter, 501 U.S. 294, 304 (1991), the need for human interaction and sensory stimulation. Petitioner complains about a number of the same conditions that were at issue in Jones 'El: constant illumination, a small indoor exercise facility and a windowless cell.

However, I cannot conclude that petitioner states a claim for relief under the theory recognized in Jones 'El. The key part of the claim in Jones 'El was that the inmates were denied almost all contact with other human beings, whether it was visitors, prison staff or

other prisoners. Petitioner does not allege the complete isolation that was alleged in Jones 'El. I can only assume that plaintiff does receive some time out of his cell, that he is not monitored by video only and that he interacts with other prisoners. Thus, although petitioner's allegations suggest severe conditions, they do not suggest that he is deprived of all human interaction and sensory stimulation. Therefore, I cannot infer a separate Eighth Amendment claim arising from the alleged combined conditions of his confinement. Instead, I will analyze each condition about which petitioner complains as separate and independent alleged Eighth Amendment violations.

First, however, I note that petitioner alleges that respondents are housing him in segregation as the result of "bogus" conduct reports. It is unclear what petitioner means by "bogus." To the extent he may be alleging that respondents are depriving him of due process, petitioner's claim must fail. 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).

Petitioner admits that the adjustment committee has sentenced him to the segregation unit for punitive reasons. This admission suggests that respondents offer petitioner a hearing before extending his segregation stay. Petitioner does not allege that he is unable to present his side of the story at these hearings. Furthermore, petitioner does not allege that he is being held in segregation for a period that exceeds the remaining term of his incarceration. Petitioner's claim that respondents violated his due process rights by housing him in segregation for three years will be dismissed as legally frivolous.

B. Legal Research

Petitioner alleges that respondents are violating his Eighth Amendment rights by requiring him to conduct legal research in a small room while handcuffed. In particular, petitioner complains that because he is handcuffed to a table, respondents are exposing him to a risk of excessive harm by preventing him from pushing an emergency button, if the need arises.

In order to state a claim under the Eighth Amendment, petitioner's allegations about prison conditions must satisfy a test that involves both an objective and subjective

component. Farmer v. Brennan, 511 U.S. 825, 834 (1994). He must show that the conditions to which he was subjected were "sufficiently serious" (objective component) and that defendants were deliberately indifferent to his health or safety (subjective component). Id.

In a case alleging a respondent's failure to protect a prisoner from harm, "[t]he inmate must prove a sufficiently serious deprivation, i.e., conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). The inmate also must prove that the prison official acted with deliberate indifference to the inmate's safety." Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996) (quoting Haley v. Gross, 86 F.3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be harmed and failing to take reasonable protective measures. Farmer, 511 U.S. at 847. The prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and the official must draw that inference. Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996). The prisoner does not have to show that the prison official intended that the prisoner be harmed; it is enough that the official ignored a known risk to the prisoner's safety. Id. at 208. In failure to protect cases, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991).

Petitioner fails to allege any facts from which one can infer that he was subject to conditions posing a substantial risk of serious harm while handcuffed to the table in the legal research room. Petitioner has not alleged that he suffers from a life-threatening illness that would require immediate medical attention or that he would be unable to escape in case of a fire, for example. Rather, petitioner appears to contend that if he should experience an emergency while performing legal research in the small room, respondents would not be able to help him. A concern about respondents' ability to address a future emergency is insufficient to meet the objective prong of the deliberate indifference test. As a result, petitioner fails to state an Eighth Amendment claim on this issue.

With respect to petitioner's claim that being handcuffed to a table in the legal research room impedes his ability to conduct legal research, petitioner's allegations fail to state a claim upon which relief may be granted. Although prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement, Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. at 539, 578-80 (1974); Procunier v. Martinez, 416 U.S. 396, 419 (1974), petitioner must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). This principle derives ultimately from the doctrine of standing and requires that petitioner demonstrate that he is or was prevented from litigating a

non-frivolous case. Id. at 352-53; Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). Petitioner does not allege that conducting research in the small room provided by respondents prevented him from litigating this case. Petitioner may find it more convenient to go to the law library than conduct legal research in a small room, but denying petitioner his preference does not amount to a constitutional violation by respondents. Because petitioner fails to allege that he sustained an actual legal injury as a result of being handcuffed to the table in the legal research room, he fails to state a claim upon which relief may be granted.

C. Outdoor Exercise

Petitioner alleges that respondents are violating his Eighth Amendment rights by requiring him to exercise indoors in a small, 10x12 foot cage with nothing inside it. Petitioner asserts that respondents are treating segregation inmates like caged animals. The Court of Appeals for the Seventh Circuit has held the prisoners do not have a constitutional right to receive their recreation outside. Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997); but see Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (outdoor exercise required under Eighth Amendment). Although inmates have a constitutional right to maintain their health, which includes a right to adequate exercise, e.g., Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988), petitioner does not allege that his opportunities for indoor exercise are

insufficient. Although petitioner may prefer more space and some work out equipment in the exercise cell, nothing in petitioner's complaint suggests that he is unable to exercise. Therefore, this claim will be dismissed as legally meritless.

D. Unsanitary Cells

Petitioner alleges that respondents are violating his Eighth Amendment rights by housing him in cells with feces, blood, food and urine on the floors and walls, thereby increasing his risk of contracting AIDS, TB, hepatitis, and skin diseases. Prison cells do not need to be comfortable or even desirable. Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir.1988) (depriving prisoner of toilet paper, soap, toothpaste and toothbrush while keeping him in filthy, roach-infested cell for a period of several days was not a constitutional violation); Morissette v. Peters, 45 F.3d 1119, 1122-23, n. 6 (7th Cir.1995) (plaintiff's "filthy" cell and inadequate cleaning supplies did not violate Eighth Amendment); Geder v. Godinez, 857 F. Supp. 1334, 1341 (N.D. Ill.1995) (defective pipes, sinks and toilets, improperly cleaned showers, stained mattresses, accumulated dust and dirt and infestation by roaches and rats did not rise to level of Eighth Amendment violation, alone or in combination); Wilson v. Schomig, 863 F.Supp. 789, 794-95 (N.D.Ill. 1994) (cell containing dirt, dust, roaches, a leaking roof during rainstorms and urine-stained mattress did not violate the Eighth Amendment).

Again, petitioner fails to allege any facts from which one can infer that respondents have been deliberately indifferent to a risk of serious harm. Pavlick, 90 F.3d at 207-08. Petitioner merely speculates that he may be exposed to AIDS, TB, hepatitis and skin diseases. However, petitioner admits that institution staff bring cleaning supplies on Saturdays. Therefore, if respondents are aware of a known risk of serious harm, petitioner's allegations show that they are not ignoring it. Although petitioner may prefer more frequent cleaning, the Constitution does not require respondents to abide by petitioner's preferences. Petitioner will be denied leave to proceed on this claim.

E. Constant Illumination

Petitioner alleges that his cell is illuminated 24 hours a day and, as a result, he is sleep deprived. Petitioner has not slept well in three years and is always tired and sick. Constant illumination may violate the Eighth Amendment if it causes sleep deprivation or leads to other serious physical or mental health problems. E.g., Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996). Therefore, I will allow plaintiff to proceed on this claim against the six named defendants.

However, petitioner faces an uphill battle in proving his claim. Petitioner does not allege how bright the light is. In previous cases, I have concluded that constant illumination with a 5-watt bulb does not rise to the level of an Eighth Amendment violation. E.g., Pozo

v. Hompe, 02-C-12-C (W.D. Wis. Apr. 8, 2003). To obtain relief under the Eighth Amendment, petitioner will have to show either that he is subjected to more intense lighting or that respondents were aware that because of his mental and physical condition, even a minimal light would subject him to a substantial risk of serious harm yet did not take any actions to alleviate that risk, such as by providing a sleep mask for his eyes when he is trying to sleep.

F. Excessive Heat and Cold

According to petitioner, respondents are violating his Eighth Amendment rights by allowing cell temperatures to become extremely hot in the summer and freezing in the winter and by not providing him with a fan or enough ice in the summer or with enough blankets in the winter. He alleges also that the heating system at the Waupun Correctional Institution "does not work."

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)). This includes a right to protection from extreme cold, id. (holding that cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment), and extreme heat, Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir. 1986). "[C] ourts 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." Dixon, 114 F.3d at 644. In certain circumstances extreme hot or cold cell temperature may constitute violations of the Eighth Amendment.

Because petitioner alleges that his cell is "extremely hot" in summer and "freezing" in winter and that the heating system at the Waupun Correctional Institution "does not work", under a liberal construction of his complaint I must allow him to proceed on this claim against respondents. To succeed on this claim, however, petitioner will have to obtain evidence of the actual temperature in his cell and be prepared to prove that as a result of the extreme heat or cold he suffered deleterious effects on his health beyond mere discomfort.

G. Lack of Pictures and Publications

Petitioner alleges that respondents violated his right to free speech by denying him access to pictures, magazines, newspapers or personal books while he remains in segregation. The Supreme Court has recognized that inmates retain a limited constitutional right to receive and read materials that originate outside the prison. E.g., Thornburgh v. Abbott, 490 U.S. 401 (1989); Turner v. Safley, 482 U.S. 78 (1987); Procunier, 416 U.S. 396; Pell v. Procunier, 417 U.S. 817 (1974). In Thornburgh, 490 U.S. at 413, the Court held that

"[r]egulations affecting the sending of a 'publication' . . . to a prisoner . . . are 'valid if [they are] reasonably related to legitimate penological interests.'" To determine whether a regulation meets this test, a court should consider four factors : (1) whether a valid, rational connection exists between the regulation and a legitimate governmental interest; (2) whether the prisoner has available alternative means of exercising the right in question; (3) whether accommodation of the asserted right will have negative effects on guards, inmates or prison resources; and (4) whether there are obvious, easy alternatives at a minimal cost.

At this stage of the proceedings I cannot determine definitively whether respondents will be able to satisfy this standard. However, I note that in Lindell v. Frank, 2004 WL 1595246, Nos. 03-2651 & 03-2765, slip op. at 5 (7th Cir. July 19, 2004), the Court of Appeals for the Seventh Circuit concluded that a "publishers only" rule that restricts prisoners from receiving hardcover books or other types of materials from noncommercial sources that could easily conceal smuggled contraband are reasonably related to a prison's legitimate penological interest. If the publications that petitioner desires are subject to respondents' publishers only rule, his claim may not survive. Without more information about the types of publications petitioner desires and the exact reasons why respondents are refusing petitioner to possess those publications, I must grant petitioner leave to proceed in forma pauperis on his First Amendment claim.

II. MOTION FOR APPOINTMENT OF COUNSEL

Petitioner has moved for the appointment of counsel to represent him in this case in which he is proceeding pro se and in forma pauperis. In support of the request, petitioner argues that he has no experience in the law, that as a prisoner he will be unable to conduct the necessary discovery to prosecute this case, that the case has merit but is complex, and that he does not have access to a law library or someone who can help him. Petitioner has been able to pursue this case thus far only because he has received the assistance of another inmate more knowledgeable than he is about legal matters, and that the inmate is no longer able to help him. He believes that without the inmate's assistance or court-appointed counsel, he will be unable to prosecute his case.

In considering whether counsel should be appointed, I first must determine whether petitioner made reasonable efforts to retain counsel and was unsuccessful or whether he was precluded effectively from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Petitioner has not made any showing that he has tried to retain counsel or that he was precluded from making such efforts. Ordinarily, before the court will find that the plaintiff has made reasonable efforts to secure counsel it requires a petitioner to provide the names and addresses of at least three lawyers that he has asked to represent him and who have declined to take the case. Because petitioner has not made this showing, I will deny his motion to appoint counsel.

ORDER

IT IS ORDERED that

1. Petitioner Luis A. Ramirez's request for leave to proceed in forma pauperis is DENIED against respondents Gary McCaughtry, Matthew Frank, Curt Janssen, Steven Schueler, Marc Clements and Steven Casperson with regard to his claims concerning segregated housing for three years, legal research, outdoor exercise and unsanitary cells;

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED against all respondents with regard to his claims that respondents violated his Eighth Amendment rights when they subjected him to constant illumination in his cell and extreme heat and cold and his First Amendment rights when they prohibited him from having pictures and publications while in segregation;

3. Petitioner's motion for appointment of counsel is DENIED.

- 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 has learned what lawyer 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 respondent or to respondent's attorney.
- 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.

- 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).
- Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent to the Attorney General for service on the state defendants.

Entered this 23rd day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge