IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DONALD BUFORD,

ORDER

Petitioner,

04-C-959-C

v.

JIM SUTTEN, M. ZALENSKI, R. KRUGER,
SANDRA HENSLER, JANEL NICHEL,
JAMES SPANBERG[1], TIM DOUMA,
PHIL KINGSTON, PAT SIEDSCHLAG,
SGT. MORRIS, DR. MIKE VANDERBROOK,
DR. CURT SCHWEBSKI and DR. WALSH,

Respondents.

- -

This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. 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. From the financial affidavit petitioner has given the court, I

[1] In the caption of his complaint, petitioner listed respondent Spanberg as "Jhon Doe." In the body of his complaint, petitioner states that on January 3, 2005, he learned that this unnamed individual's name is James Spanberg. I have adjusted the caption of this order accordingly.

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 Donald Buford is an inmate at Columbia Correctional Institution in

Portage, Wisconsin. At the institution, respondent Phil Kingston serves as warden; respondent Tim Douma is the security director; respondent R. Kruger is a captain and respondent Janel Nichel is an administrator captain; respondents Jim Sutten and James Spanberg are unit managers; respondent Morris is a sergeant; respondent M. Zalenski is a corrections officer; and respondent Sandra Hensler served as petitioner's advocate at a disciplinary hearing. Respondent Pat Siedschlag is the manager of the institution's health services unit and respondents Walsh, Mike Vanderbrook and Curt Schwebski are doctors at the institution.

1. Cell Assignment

As a unit manager, respondent Sutten is responsible for assigning the inmates on his units to cells. Sometime before August 23, 2003, respondent Sutten removed a white inmate from the cell he shared with an inmate T. Jackson because Jackson, who ran one of the gangs on the unit, was forcing the inmate to send money to Jackson's mother who would send it to Jackson's prison account. Respondent Sutten placed petitioner, who is black, in the cell with Jackson, who then forced petitioner to give him money. Respondent Sutten stopped this conduct when he learned that petitioner was sending money to the same address as the white inmate. The white inmate was transferred to another unit to be placed in temporary lock up, but Sutten left petitioner and Jackson in their cell and placed them

on temporary lock up pending an investigation into the matter. Temporary lock up lasts 24 hours a day and the investigation could last up to three 21-day periods. According to prison rules, respondent Sutten should have taken petitioner out of the cell he shared with Jackson because they were both under investigation. However, he moved only the white inmate knowing that Jackson would force petitioner to order items for him from the canteen, which petitioner did.

In addition, respondent Sutten violated Department of Corrections and Columbia Correctional Institution rules by placing petitioner in a cell with Jackson because petitioner is mentally ill and receives medication. Petitioner may be housed only with other inmates receiving medication because unmedicated inmates try to misuse inmates on medication. By placing petitioner in a cell with Jackson, respondent Sutten placed petitioner's safety at risk.

On August 23, 2003, a fight broke out between petitioner and Jackson. Before the fight broke out, petitioner and Jackson were arguing loudly and using profanity. Respondent Zalenski was working at the time the fight occurred, but did not check the cells in her wing to make sure there were no problems. If she had checked petitioner's cell, he would have asked to be taken out of the cell and the fight would not have occurred. The fight lasted at least 35 minutes; petitioner received a bloody nose and injured Jackson in the course of defending himself.

2. Investigation of the altercation

After the fight, respondent Kruger asked petitioner if he hit Jackson with a lock. Petitioner said no. Respondent Kruger asked Jackson the same question when petitioner was not around and Jackson said petitioner did not hit him with a lock. Jackson did tell respondent Kruger that he had been stabbed with a six-inch shank and hit with a radio, although he had no injuries that could be caused by a shank. Respondent Kruger went to the cell to investigate; he found no shank and heard the radio playing music without any sign that it had been used in the fight. Petitioner was strip searched but no shank was found. Respondent Kruger knew that Jackson was lying and that no weapon had been used in the fight, but he noted in petitioner's conduct report that petitioner had hit Jackson with a lock despite the fact that both inmates told him that no lock had been used. Petitioner filed a grievance against respondent Kruger for filing a false conduct report, but it was denied.

3. Disciplinary hearing

Before petitioner's disciplinary hearing, respondent Douma placed petitioner in segregated confinement and imposed approximately seven restrictions on him. For example, petitioner was not allowed to have a cup in his cell, which prevented him from drinking water. At the hearing, respondent Hensler represented petitioner. She failed to prove that the evidence indicated that petitioner was not guilty. Her failure caused petitioner great

pain and distress.

Respondents Nichel and Spanberg were the hearing officers. Although petitioner told them he did not hit Jackson with a lock and no other weapon had been discovered after the cell inspection, they believed respondent Kruger's statement that petitioner used a lock in the fight and found him guilty. They sentenced petitioner to one year in segregated confinement, extended his sentence by six months and imposed $15,000 restitution, thereby causing him mental stress and physical pain. There was no evidence to support their decision. In addition, because petitioner had been found guilty at the hearing, the sheriff charged him with a felony offense in connection with the fight. Petitioner faced 120 years but fought the charge for a year and got it reduced to a misdemeanor with 3 years' probation.

4. Restrictions in segregated confinement

During the year that petitioner was in segregated confinement, respondent Douma imposed several restrictions on him. Petitioner was not able to go outside for recreation or exercise. When he was brought out of his cell, he was placed in handcuffs and leg restraints and two guards escorted him. He was placed on "back of the cell," which meant that every time an official walked past his door, he had to stand up and face the back wall. He was placed on "lower trap bag lunch" restriction, which meant that he was given three cold meals

a day. In addition, he was placed on "sharps" restriction, which prevented him from cleaning his cell. At times, these restrictions lasted for 90 consecutive days. Petitioner did not cause any problems while in segregation; respondent Douma imposed these restrictions to cause him pain and discomfort.

5. Respondent Kingston

Respondent Kingston approved the sentence imposed by the hearing officers and denied petitioner's grievances and appeals. He told petitioner that the sentence was appropriate because Jackson had been injured in the fight. In addition, he allowed prison staff to take petitioner's clothes and bed, made him sleep naked on the floor for more than 24 hours and walk down a hallway naked. Also, he allowed respondent Morris to steal petitioner's mail and send it to the sheriff to establish petitioner's motive for fighting with Jackson.

6. Respondent Siedschlag

Before being placed in segregated confinement, petitioner paid for treatment for his genital warts. A doctor ordered treatment for him on two occasions, but respondent Siedschlag refused to provide the treatment until petitioner was released from segregated confinement. Petitioner wrote at least seven grievances asking to be treated or to have his

money refunded. However, his treatment was delayed 5-7 months, causing his warts to spread. If petitioner had received treatment when he requested it, his warts would not be as bad as they are today.

7. Respondents Walsh, Vanderbrook and Schwebski

Respondents Walsh, Vanderbrook and Schwebski have had contact with petitioner. They know that he suffers from depression and takes medicine for it four times a day. Petitioner needs treatment for his depression but they have not sent petitioner anywhere for treatment. This causes petitioner pain and harm.

DISCUSSION

A. Cell Assignment

I understand petitioner to allege that respondent Sutten violated his rights under the equal protection clause of the Fourteenth Amendment by removing a white inmate from Jackson's cell and placing petitioner, who is black, in the cell. In addition, I understand petitioner to allege that his placement in Jackson's cell violated rules of either the Wisconsin Department of Corrections or Columbia Correctional Institution.

1. Equal protection

Petitioner alleges that respondent Sutten removed a white inmate from Jackson's cell and placed petitioner, who is black, in the cell. Petitioner believes that respondent Sutten placed him in the cell with inmate Jackson because he and Jackson are both black. I construe his allegations as raising a claim of unlawful discrimination under the equal protection clause of the Fourteenth Amendment. An individual seeking relief on a claim of race discrimination under the equal protection clause must allege facts suggesting that a person of a different race would have been treated more favorably. Jafree v. Barber, 689 F.2d 640, 643 (7th Cir. 1982) ("To sufficiently state a cause of action the plaintiff must allege some facts that demonstrate that his race was the reason for the defendant's inaction."); see also Jaffe v. Federal Reserve Bank of Chicago, 586 F. Supp. 106, 109 (N.D. Ill. 1984) ("[A plaintiff] cannot merely invoke his race in the course of the claim's narrative and automatically be entitled to pursue relief ."). Construed liberally, petitioner's allegations state a claim for unlawful discrimination because they suggest that the white inmate was treated more favorably than he. According to petitioner's allegations, respondent Sutten removed the white inmate from Jackson's cell when Jackson pressured him for money and replaced the white inmate with petitioner, knowing that Jackson would force petitioner to order items from the canteen. These allegations are sufficient to suggest that Sutten treated the white inmate more favorably than petitioner. Therefore, I will allow petitioner to proceed on this claim.

2. Violation of department or prison rules

Petitioner alleges that respondent Sutten violated either the rules of the Wisconsin Department of Corrections or Columbia Correctional Institution when he placed petitioner, an inmate receiving medication for mental illness, in a cell with inmate Jackson, who is not receiving medication. By itself, this allegation is insufficient to state a claim that respondent Sutten violated any rights accorded to petitioner by federal law. Accordingly, petitioner's request for leave to proceed in forma pauperis on this claim will be denied because the claim is legally frivolous.

B. Failure to Protect

Petitioner alleges that respondents Sutten and Zalenski violated his rights under the Eighth Amendment by failing to protect him from being strong-armed and assaulted by inmate Jackson on August 23, 2003. "Prisoners may obtain relief under the Eighth Amendment for injuries sustained in prison if the injury is objectively serious and the prison official acted with deliberate indifference to the safety and health of the inmate." Peate v. McCann, 294 F.3d 879, 882 (7th Cir. 2002) (citing Farmer v. Brennan, 511 U.S. 825, 834 (1995)); Jelinek v. Greer, 90 F.3d 242, 244 (7th Cir. 1996). In a case alleging an official'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). In addition, the inmate must prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively condon[ing] the attack by allowing it to happen." 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 assaulted and failing to take reasonable protective measures. Farmer, 511 U.S. at 847; Peate, 294 F.3d at 882 ("[Plaintiff] must demonstrate only that 'the defendants actually knew of a substantial risk that [the prisoner] would seriously harm him.'") (citing Haley, 86 F.3d at 641 (emphasis in original)).

Liberally construing petitioner's allegations, I understand him to allege that respondent Sutten violated his Eighth Amendment rights by placing him in a cell with inmate Jackson even though he knew that Jackson was likely to assault anyone sharing his cell. Respondent Sutten knew that Jackson had strong-armed the white inmate before placing petitioner in his cell; therefore, it is reasonable to infer that he knew petitioner faced similar dangers. This is sufficient to state a claim against Sutten. However, petitioner does not state a claim under the Eighth Amendment by alleging that respondent Zalenski did not check on petitioner and inmate Jackson before the fight despite the fact that they were arguing loudly and using profanity. Petitioner has not alleged that respondent Zalenski failed to take reasonable steps to protect petitioner, knowing that there was a substantial

likelihood that petitioner would be assaulted. Petitioner will be allowed to proceed on this claim against respondent Sutten only; respondent Zalenski will be dismissed from this case.

C. Investigation of the Altercation and Disciplinary Hearing

1. Due process

Petitioner alleges several violations of his rights under the due process clause of the Fourteenth Amendment in connection with the investigation of his fight with inmate Jackson and the subsequent disciplinary hearing. I understand him to allege that (1) respondent Kruger violated petitioner's due process rights by falsely accusing him of hitting inmate Jackson with a lock during the altercation even though both Jackson and petitioner denied that a lock had been used; (2) respondent Hensler, petitioner's advocate at the hearing, violated petitioner's due process rights by failing to get the conduct charge dismissed; and (3) respondents Nichel and Spanberg, the hearing officers, violated petitioner's due process rights by finding him guilty despite the lack of evidence. As a result of these actions, petitioner alleges, he was sentenced to one year in segregated confinement, ordered to pay $15,000 in restitution and had his sentence extended by six months. In addition, petitioner alleges that a new criminal prosecution was brought against him because he was found guilty at the disciplinary hearing.

Petitioner's allegations call into question the correctness of the conclusions reached in the conduct report and at the disciplinary hearing. When a petitioner draws into question the extension of his sentence as the result of a disciplinary hearing, deciding that his due process rights were violated would imply the invalidity of his disciplinary sentence and of the extension of his sentence, a state of affairs that prevents petitioner from proceeding under § 1983. Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) (citing Edwards v. Balisok, 520 U.S. 641, 648 (1997) (Fourteenth Amendment due process claim for money damages "that necessarily impl[ies] the invalidity of the punishment imposed is not cognizable under § 1983")). Petitioner cannot raise this claim in a § 1983 suit until he can show that he has succeeded in having his disciplinary sentence "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus" under 28 U.S.C. § 2254. Heck v. Humphrey, 512 U.S. 477, 487 (1994). Petitioner has not made the required showing. This court cannot convert his complaint into a petition for habeas corpus on its own. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477). Therefore, this claim will be dismissed and respondents Kruger, Hensler, Nichel and Spanberg will be dismissed from this case.

2. Eighth Amendment

Petitioner peppers his allegations concerning the investigation of the fight and his disciplinary hearing with language used to analyze claims under the Eighth Amendment's cruel and unusual punishment clause, but on the basis of the facts he has alleged he has no possible claim under that amendment.

3. First and Fourth Amendments

I understand petitioner to allege that respondent Warden Kingston and respondent Morris violated his rights under the First and Fourth Amendments by sending a piece of petitioner's mail to the sheriff's office as part of the investigation of his altercation with Jackson. These claims are foreclosed by United States v. Whalen, 940 F.2d 1027 (7th Cir. 1991), in which the Court of Appeals for the Seventh Circuit upheld a district court's decision to allow two letters written by an inmate to be introduced at his trial for murdering another inmate. The court of appeals agreed with the district court's conclusion that the inmate had no legitimate expectation of privacy in his outgoing mail (and therefore no Fourth Amendment protection for the mail) because the prison required inmates to leave outgoing mail unsealed. In addition, the court rejected the inmate's First Amendment argument, reasoning that it is well-settled that prison officials may inspect an inmate's mail for contraband without violating the inmate's First Amendment rights. Id. at 1034-35.

Wisconsin Department of Corrections regulations allow prison officials to open and

inspect all incoming and outgoing mail for contraband. Wis. Admin. Code § DOC 309.04(4)(a). Thus, petitioner had no legitimate expectation of privacy in his mail and no claim under the Fourth Amendment. His First Amendment claim fails as well. If an inmate's mail can be confiscated and presented as evidence against the inmate in a trial, prison officials may confiscate an inmate's mail and turn it over to law enforcement officials as part of a criminal investigation. Petitioner will be denied leave to proceed in forma pauperis on these claims and respondent Morris will be dismissed from this case.

D. Restrictions in Segregated Confinement

I understand petitioner to allege that respondent Douma, the security director at Columbia, violated petitioner's rights under the Eighth Amendment by approving the restrictions imposed on petitioner while he was in segregated confinement. 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). In order to state a claim under the Eighth Amendment, petitioner's allegations about prison conditions must satisfy a test that involves both objective and subjective components. 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. However, placement in segregated confinement by itself does not violate the Eighth Amendment and the restrictions accompanying that status 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, 107-08 (7th Cir. 1971).

The allegations that petitioner did not have a drinking cup in his cell and that he received three cold meals a day fail to state a claim under the Eighth Amendment. Petitioner does not contend that he was denied all access to drinking water or that the food he received was nutritionally inadequate. Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001) (prison officials have duty under Eighth Amendment to insure that inmates receive adequate food). The Eighth Amendment does not entitle petitioner to hot meals. Similarly, in alleging that he was subject to "back of cell" and "sharps" restrictions and placed in restraints and escorted by two guards each time he left his cell, petitioner is describing temporary inconveniences incident to placement in segregated confinement. The allegations are insufficient to state a claim under the Eighth Amendment because they do not involve either wanton infliction of pain or punishments that are grossly disproportionate to the offense for which petitioner was placed in segregation. On the contrary, respondent Douma imposed these restrictions at a time when officials suspected petitioner of attacking and injuring another inmate and after he had been found guilty of that offense.

Petitioner's allegation that he was not allowed to go outside for exercise or recreation while in segregated confinement states an arguable basis for an Eighth Amendment claim. Denial of exercise may constitute a constitutional violation "in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened." Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996) (viable claim stated where inmate not allowed recreation for seven consecutive weeks); see also Delaney v. DeTella, 256 F.3d 679 (7th Cir. 2001) (denying qualified immunity to prison official who denied inmate in segregation all out-of-cell exercise for six months); Jamison-Bay v. Thieret, 867 F.2d 1046, 1432 (7th Cir. 1996) (reversing summary judgment for prisoner who was in segregation for 101 days and denied exercise five times a week); but see Thomas v. Ramos, 130 F.3d 754, 764 (denial of outdoor exercise for seventy days permissible). Petitioner states that the restrictions in segregation lasted for as long as ninety days at a time. Thus, it is reasonable to infer that he was denied outside recreation for ninety consecutive days. Although the question is close, I will allow petitioner to proceed on his denial of exercise claim against respondent Douma. However, I note that petitioner will not succeed on this claim if he had recreational opportunities *inside* the prison that mitigated the severity of the outdoor restriction, Thomas, 130 F.3d at 764, or if he was denied outdoor exercise because he posed a security risk. Pearson v. Ramos, 237 F.3d 881, 885 (7th Cir. 2001).

E. Respondent Kingston

Petitioner makes several allegations against respondent Kingston, none of which is sufficient to allege a violation of his constitutional rights. First, he alleges that respondent Kingston approved the sanctions imposed by "the hearing staff," which I construe to be a reference to respondents Nichel and Spanberg. He contends that respondent Kingston denied his grievances and appeals, telling petitioner that the sanctions imposed on him were appropriate because inmate Jackson had been injured in the altercation. To the extent petitioner is arguing that respondent Kingston participated in the violation of his due process rights, I have concluded that this claim is not cognizable under § 1983 because it involves a challenge to the duration of petitioner's sentence. Therefore, petitioner may not proceed on this claim against respondent Kingston.

Second, petitioner alleges that respondent Kingston authorized his staff to take away petitioner's bed and clothes, forcing him to sleep naked on the floor for more than 24 hours. Also, he alleges that the staff made him walk naked down a hallway. I understand petitioner to argue that these actions constituted cruel and unusual punishment in violation of the Eighth Amendment. An inmate may state a claim under the Eighth Amendment by alleging he was left naked in cold temperatures or unsanitary conditions. Del Raine v. Williford, 32 F.3d 1024, 1033-34 (7th Cir. 1994) (citing cases); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (inmate left in unsanitary, cold cell for eleven days without clothes or bed).

Petitioner has not alleged that he was left naked in a cell that lacked adequate heat or was unsanitary. Given the short period of time petitioner has alleged he was left without clothes, I cannot infer that respondent Kingston or his staff put petitioner's health or safety at risk. Therefore, petitioner will be denied leave to proceed in forma pauperis on this claim. Respondent Kingston will be dismissed from this case.

F. Respondent Siedschlag

I understand petitioner to allege that respondent Siedschlag delayed treatment of his genital warts in violation of the Eighth Amendment. The government must "'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 succeed on an Eighth Amendment claim that the denial of medical care amounts to cruel and unusual punishment, a prisoner must show that prison officials acted with "deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. This standard has both objective and subjective components. Petitioner must allege facts from which it can be inferred that he had an objectively serious medical need and that prison officials were aware of and deliberately indifferent to this need. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

The phrase "serious medical needs" encompasses 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. Id. at 1371. In this case, petitioner alleges that he has genital warts, and that respondent Siedschlag withheld treatment for them for 5-7 months until he was released from segregated confinement, during which time the warts spread and caused him pain. Genital warts are the result of a sexually transmitted viral infection. Left untreated, they may cause itching, irritation or bleeding. AMERICAN MEDICAL ASSOCIATION, COMPLETE MEDICAL ENCYCLOPEDIA 394 (2003).

Petitioner contends that he wrote no less than seven grievances asking for the treatment that doctors had prescribed for him on two occasions. It is reasonable to infer that respondent Sieschlag knew of petitioner's repeated requests for treatment, given her position as manager of Columbia's health services unit. At this stage of the proceedings, I am unwilling to conclude that the 5-7 month delay in treatment did not constitute deliberate indifference to petitioner's medical condition resulting in needless pain and suffering. Therefore, petitioner will be allowed to proceed on this claim against respondent Siedschlag.

G. Respondents Vanderbrook, Schwebski and Walsh

Finally, I understand petitioner to allege that respondents Vanderbrook, Schwebski and Walsh are denying him treatment for depression in violation of the Eighth Amendment.

He contends that these respondents, each of whom is a doctor, know that he suffers from depression and takes medication four times daily yet have not sent him to an appropriate facility for treatment. At most, this allegation amounts to a disagreement between petitioner and respondents over the appropriate treatment for his mental illness. "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." Snipes, 95 F.3d at 592 (quotations omitted). Petitioner acknowledges that he receives medication for his depression and has not alleged that respondents are intentionally mistreating him so as to make it likely that his condition will deteriorate dramatically. Petitioner's request for leave to proceed in forma pauperis on this claim will be denied and respondents Vanderbrook, Schwebski and Walsh will be dismissed from this case.

H. Motion for Appointment of Counsel

Petitioner asks that counsel be appointed to represent him in this case. Before the court can appoint counsel in a civil action such as this, it must find first that the petitioner made a reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). In this court, a petitioner must list the names and addresses of at least three lawyers who

declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Petitioner does not suggest that he has made an effort to find a lawyer on his own and that his efforts have failed.

Second, the court must consider whether the petitioner is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is too new to allow me to assess petitioner's abilities. Therefore, petitioner's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

ORDER

IT IS ORDERED that

1. Petitioner Donald Buford's request for leave to proceed in forma pauperis is GRANTED on his claim that respondent Jim Sutten violated his rights under the equal protection clause of the Fourteenth Amendment by placing him in a cell with inmate Jackson after removing a white inmate from the cell;

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his claim that respondent Sutten violated his rights under the Eighth Amendment by failing to protect him from being assaulted by inmate Jackson;

3. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his claim that respondent Tim Douma denied him exercise in violation of the Eighth Amendment;

4. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his claim that respondent Pat Siedschlag withheld treatment for his genital warts in violation of the Eighth Amendment;

5. Petitioner is DENIED leave to proceed in forma pauperis on all other claims raised in this lawsuit. Respondents M. Zalenski, R. Kruger, Sandra Hensler, Janel Nichel, James Spanberg, Phil Kingston, Sgt. Morris, Dr. Mike Vanderbrook, Dr. Curt Schwebski and Dr. Walsh are DISMISSED from this case;

6. Petitioner's motion for appointment of counsel is DENIED without prejudice.

7. 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 respondents or to respondents' attorney.

8. 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.

9. The unpaid balance of petitioner's filing fee is $148.34; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

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

11. Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. Those papers are not considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event respondents wish to examine them.

Entered this 29th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge