IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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REGGIE TOWNSEND,

ORDER

Plaintiff,

05-C-204-C

v.

LARRY FUCHS,

Defendant.

- -

This is a civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Reggie Townsend is currently incarcerated at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. In an order dated May 18, 2005, I screened plaintiff's complaint and granted him leave to proceed in forma pauperis on claims against two officials at the institution: (1) defendant Larry Fuchs, the security director, who plaintiff alleges violated his Eighth Amendment rights by forcing him to sleep on a wet concrete floor during plaintiff's 63-day confinement in temporary lock-up; and (2) a physician identified as Heinzl, who allegedly violated plaintiff's Eighth Amendment rights by deliberately giving plaintiff medication that caused him to continue to bleed internally and experience pain in his stomach, liver and kidneys. After it became clear that plaintiff

needed appointed counsel, I asked two members of the Wisconsin Bar, David Harth and Melody Glazer, to represent him, and they agreed. Thereafter, plaintiff, through counsel, filed an amended complaint in which he clarified his allegations against defendant Fuchs and omitted all allegations against Heinzl.[1] Through an oversight, the amended complaint was not forwarded to chambers to be screened as required by the Prison Litigation Reform Act. 28 U.S.C. § 1915A. This omission came to the court's attention when plaintiff filed a motion for leave to file a second amended complaint, which is presently before the court. This motion was filed one day before defendant Fuchs filed a motion for summary judgment claiming, among other things, that he was not personally involved in depriving plaintiff of his Eighth Amendment rights.

In his motion for leave to amend a second time, plaintiff argues that good cause supports his proposed amendment. He contends that, through discovery, he has learned the identities of two prison officials who were responsible for monitoring the conditions in which he was kept while in temporary lock-up. He proposes to add these individuals as defendants and assert Eighth Amendment and due process claims against them.

Even if the screening requirement in § 1915A did not exist, plaintiff would need leave of the court to file a second amended complaint because defendants have filed an answer to

[1]I understand plaintiff to have voluntarily dismissed his claim against Heinzl.

both of his complaints. Whether to grant leave to amend the pleadings pursuant to Fed. R. Civ. P. 15(a) is within the discretion of the trial court. Sanders v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995). The Court of Appeals for the Seventh Circuit has enumerated four conditions that justify denying a motion to amend: undue delay; dilatory motive on the part of the movant; repeated failure to cure previous deficiencies; and where the amendment would be futile. CogniTest Corporation v. Riverside Publishing Company, 107 F.3d 493, 499 (7th Cir. 1997). Because plaintiff learned only recently through discovery the identities of the individuals who monitored his condition, I do not believe that his request for leave to amend is the result of undue delay or is meant solely to delay resolution of this case. Nor is this a case in which plaintiff has failed repeatedly to cure deficiencies in his pleadings. Thus, the question is whether plaintiff's proposed amendment would be futile. A proposed amendment is futile if it would not survive a motion to dismiss for failure to state a claim. General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1085 (7th Cir. 1997) (internal citations omitted). Determining whether the proposed second amended complaint fails to state a claim requires the same analysis as § 1915A. Therefore, I will set out the allegations in plaintiff's proposed second amended complaint, a copy of which is attached to his brief in support of his motion for leave to amend, and determine whether they are sufficient to state any viable federal claims.

A. Allegations of Fact

At all times relevant, plaintiff Reggie Townsend was incarcerated at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Defendant Larry Fuchs is employed by the Wisconsin Department of Corrections as security director at New Lisbon. Defendant Jeff Jaeger is employed as an administrative captain at the institution and defendant Jerry Allen is employed as a segregation sergeant at the institution.

On November 15, 2004, plaintiff was sent to temporary lock-up pending an investigation. He spent 63 days in that status. Although the cell in which he was detained was designed for one occupant only, plaintiff had a cell mate during the entire time he was in temporary lock-up. The cell had only one bed raised off the floor. Because there were two inmates in the cell, plaintiff was forced to sleep on a mattress on the floor. The mattress plaintiff had was wet, moldy and foul-smelling. Plaintiff was not allowed to leave his cell for any reason, including exercise, during this time. As a result of the conditions in his cell and his inability to exercise, plaintiff suffered respiratory problems, chest and stomach pains, muscle aches and liver and kidney problems. Also, upon his return to general population, he began to bleed internally.

Defendants knew of plaintiff's living conditions in temporary lock-up. Plaintiff complained repeatedly to defendants about his living conditions during and after his confinement. Plaintiff never received a conduct report in connection with the investigation

that prompted his being sent to temporary lock-up. Also, defendants did not review plaintiff's incarceration in temporary lock-up timely as required by the Wisconsin Administrative Code.

B. Discussion

Plaintiff contends that the conditions of his confinement violated his Eighth Amendment protection against cruel and unusual punishment. He contends also that defendants violated his rights under the due process clause of the Fourteenth Amendment by subjecting him to these conditions without notice, a hearing or meaningful review of his status.

When I screened plaintiff's original complaint in May 2005, I denied plaintiff leave to proceed in forma pauperis on claims that his Eighth Amendment rights were violated when he was not allowed to exercise outside his cell during the 63 days he was held in temporary lock-up, and when he was forced to share a cell with another inmate.

In the proposed second amended complaint, plaintiff realleges his inability to exercise and the fact of his double-celling. In his brief, plaintiff explains that the inclusion of these allegations are designed to "plead with particularity" factual allegations regarding plaintiff's living conditions. Plaintiff does not suggest that he is attempting to reassert claims that either one or both of these conditions by themselves were constitutionally impermissible.

Indeed, plaintiff states that the only new claim he is raising in his second amended complaint is a claim that his Fourteenth Amendment rights were violated when he was "subjected to cruel and unusual punishment without notice, a hearing or meaningful review of his confinement in TLU." In this regard, plaintiff appears to be claiming that if his conditions are so harsh that they violate the Eighth Amendment, then surely they are "atypical and significant" so as to invoke the procedural protections of the Fourteenth Amendment due process clause under Sandin v. Conner, 515 U.S. 472, 484 (1995).

The flaw in plaintiff's reasoning on this Fourteenth Amendment claim is that if, as he contends, his conditions in temporary lock-up were so harsh as to violate the Eighth Amendment, no amount of pre-placement procedure would safeguard against the violation of his constitutional rights. In other words, it would not be permissible for prison officials to house a prisoner in conditions that offend the Eighth Amendment, so long as they give an inmate notice, an opportunity to be heard, and reasons for their actions. Therefore, plaintiff will not be allowed to proceed in his second amended complaint on a claim that he was subjected to cruel and unusual punishment without being afforded procedural due process in violation of his Fourteenth Amendment rights.

However, it is possible that plaintiff's contention is that the conditions in temporary lock-up were atypical and significant in comparison to the ordinary incidents of plaintiff's confinement even though they may not have been harsh enough to violate the Eighth

Amendent. Under this theory, the critical question is how severe the restrictions would have to be in order to reach the "atypical and significant" threshold. As the Supreme Court recently noted, it is not clear what baseline courts should use when examining conditions of confinement under the Sandin standard. Wilkinson v. Austin, 125 S. Ct. 2384, 2394 (2005). Sandin and Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997) involved inmates who had been confined to disciplinary segregation. In each case, the "atypical and significant" inquiry focused on a comparison between the conditions of confinement in disciplinary segregation and those in administrative, or non-disciplinary, confinement. In Sandin, 515 U.S. at 486, the Supreme Court held that the conditions of Sandin's confinement in disciplinary segregation were not atypical and significant because they did not exceed in degree or duration the conditions in administrative confinement, which Sandin could have been placed in at the prison officials' discretion. Sandin and Wagner have limited value in this case because plaintiff does not allege that he was placed in disciplinary segregation but rather temporary lock-up, a form of administrative confinement.

Wilkinson provides more guidance for plaintiff's claim. In that case, the Supreme Court held that the conditions of confinement in Ohio's "supermax" prison were atypical and significant against "any plausible baseline." Wilkinson, 125 S. Ct. at 2394. Thus, one way plaintiff might be able to demonstrate that his placement in temporary lock-up constituted an atypical and significant hardship is by showing that his conditions were

analogous to those at issue in Wilkinson. Otherwise, plaintiff will have to establish the ordinary incidents of prison life in Wisconsin and persuade the court that the conditions in temporary lock-up were atypical and significant in comparison.

C. Conclusion

Because I have determined already that plaintiff has stated a viable Eighth Amendment claim with respect to his mattress and because plaintiff has stated a potential claim that his due process rights were violated, it would not be futile to grant him leave to file his second amended complaint. Therefore, I will grant plaintiff's motion for leave to amend. The addition of two new defendants will push the schedule for this case back. Therefore, I will strike the calendar in this case. Defendant Fuchs does not need to file an answer to the new complaint and may rest on the motion for summary judgment he has filed with the court. If he chooses this course of action, the court will set a new deadline for plaintiff to respond to the motion. If defendant Fuchs decides to file an answer and withdraw his motion for summary judgment, he should notify the court as soon as possible.

ORDER

IT IS ORDERED that

1. Plaintiff Larry Townsend's motion for leave to amend his complaint is

GRANTED; plaintiff's second amended complaint is accepted as the operative pleading in this case;

2. Plaintiff is GRANTED leave to proceed against defendants Fuchs, Jaeger and Allen on his claims that (1) the conditions of his confinement in temporary lock-up violated his Eighth Amendment protection against cruel and unusual punishment and (2) his transfer to temporary lock-up violated his rights under the due process clause of the Fourteenth Amendment;

3. The pretrial scheduling and trial date in this case are STRICKEN. As soon as defendants have filed a responsive pleading to the second amended complaint, the case will be scheduled for a status conference.

4. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's second amended complaint and this order are being sent today to

the Attorney General for service on defendants Jaeger and Allen.

Entered this 3rd day of April, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge