IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK D. MARSHALL,

ORDER

Petitioner,

06-C-617-C

v.

JANEL NICKEL; SEAN SALTER;
GREG GRAMS, Warden at CCI;
C/O JAMES; C/O T. BITTELMAN;
C/O NEUMAIER, Medical Doctor SULIENE;
ICE MARY LEISER; ICE BURT TAMMINGA;
RN. NANCY HAHNISCH; LT. LIPINSKI;
Psychiatrist DANA DIEDRICH; SANDRA
SITZMAN, HSU Manager; RN. SUE WARD;
RN. LINDY MUCHOW; Secretary of DOC
MATTHEW J. FRANK; 2nd Shift SGT. FINK;
RN. STEVE HELGERSON; and RN. KIM CAMBELL;
MIKE VANDENBROOK; JANET WALSH;

Respondents.

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This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner Mark D. Marshall, who is a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. In an order dated October 26, 2006, I concluded that petitioner

was unable to prepay the full fees and costs of starting this lawsuit and allowed him to proceed in this action without making an initial partial payment. 28 U.S.C. § 1915(b)(4). Petitioner has filed a motion for appointment of counsel with his complaint.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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'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. Ordinarily, this court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion. If respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a) with respect to any of the claims on which he is granted leave to proceed, 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).

As a preliminary matter, I note that after filing this lawsuit on October 27, 2006, petitioner was transferred from the Columbia Correctional Institution to the Waupun Correctional Institution. In a letter dated December 24, 2006, petitioner asserts that he is not receiving mental health care at Waupun and asks for injunctive relief, specifically, a

transfer to a psychiatric treatment facility. Unfortunately, this new claim cannot be raised in the context of this lawsuit. It involves persons who are not named as respondents in this case. In addition, the 1996 Prison Litigation Reform Act requires that a petitioner exhaust his administrative remedies before filing suit. Because petitioner was transferred after he filed suit in this court, he cannot have exhausted his administrative remedies on his new claim as required. Therefore, no consideration will be given to the matter raised in petitioner's December 24 letter. Petitioner is free to raise the claim in a separate lawsuit, after he properly exhausts his administrative remedies. Further, petitioner has requested an emergency telephone conference regarding the conditions of his confinement at Waupun Correctional Institution. This request was assigned docket #4. For the reasons discussed above, this request will be denied.

From petitioner's complaint, I understand him to allege the following facts.

FACTS

A. Parties

Petitioner Mark Marshall is a prisoner who is presently housed at the Waupun Correctional Institution. At all times relevant to this case, petitioner was housed at Columbia Correctional Institution.

At times relevant to this complaint the respondents were working in the following

capacities at the Columbia Correctional Institution: Janel Nickel was the security director; respondent Sean Salter was a "seg. captain"; respondent Greg Grams was warden; respondents James, Neumaier and T. Bittelman were correctional officers; respondent Lipinski was a "team supervisor"; respondent Fink was a sergeant; respondent Suliene was a medical doctor who was responsible for petitioner's health care; respondents Mary Leiser and Burt Tamminga were inmate complaint examiners; respondents Nancy Hahnisch, Sue Ward, Lindy Muchow, Helgerson and Cambell were nurses; respondent Sitzman was a health services manager; respondent Dana Diedrich was a psychiatrist; respondent Mike Vandenbrook was a psychologist and respondent Janet Walsh was the chief psychologist.

B. Denial of Medical Care

Petitioner suffers from several physical medical conditions including hypertension, cysts on his kidneys, keratoconus in his right eye and a hernia. Respondent Suliene has refused to treat petitioner for these conditions, although he has requested medical exams and treatment repeatedly. For example, for many years petitioner took Lisinopril for treatment of his hypertension. On September 6, 2005, respondent Suliene discontinued petitioner's prescription for the drug after he attempted to overdose on it; respondent Suliene did not examine petitioner before discontinuing his prescription. Since then she has not monitored petitioner's health to determine whether his hypertension has worsened and his risk of heart

attack or stroke has increased. In addition, respondent Suliene refuses to send petitioner to see his nephrologist at the UW Hospital for assessment and treatment of his kidney problems, in spite of her belief that petitioner would benefit from further assessment. She told petitioner that she would not refer him for an appointment because "[he is] young" and would "be able to stand it some more."

Respondents Ward, Muchow and Cambell refuse to check petitioner's blood pressure weekly, as is directed by his doctor at the UW Hospital. Further, all three have altered petitioner's medical records to include notations that he refused treatment and received medical care or exams when he did not.

Petitioner suffers from mental illness. However, petitioner has not received mental health treatment since his placement in segregation status on September 7, 2005. As a result, petitioner's mental health has declined. He "has relapsed into a constant cycle of self-abusive behavior," experiences "mental and emotional torment," attempted suicide, engaged in "other bizarre behavior," received clinical observation placement on five occasions and received one "point strap down bed" placement. Respondent Vandenbrook has done nothing to improve petitioner's condition. At some point, respondent Walsh saw petitioner twice and offered him psychiatric medication, which he refused to take. Since then, petitioner has sent respondent Walsh numerous requests for an appointment and for medications, but she now refuses to speak to him. In addition, respondent Walsh will not

allow respondent Diedrich to treat petitioner.

Petitioner is bothered by the constant loud noises made by other inmates banging on cell fixtures and by the frequent opening of the "bubble door" to his unit. When petitioner complained that the noise made it difficult for him to sleep and caused him mental stress, the inmate complaint examiner advised him that the "PSU Supervisor would follow up with [him] to help [him] cope." Respondent Walsh received a copy of this report, but refused to offer petitioner any assistance in coping with the noise.

C. Denial of Out-of-Cell Exercise

Following petitioner's placement in segregation status at the Columbia Correctional Institution, the disciplinary committee denied him access to out-of-cell exercise. Respondent Salter implemented this restriction. As a result of the exercise restriction, petitioner experienced emotional and physical "decompensation." When petitioner filed an inmate complaint regarding the exercise restriction on October 28, 2005, respondent Tamminga dismissed his inmate complaint and respondent Grams upheld the dismissal.

D. Rubber Mattress Restriction

From April 28, 2006 until June 22, 2006, petitioner was given a "black rubber tire mat" to sleep on instead of a standard mattress. Sleeping on this hard surface caused him

muscle pains in his legs, thighs and back. On May 1, 2006, respondent Nickel provided petitioner with a memo explaining the reason she had imposed the restriction, in which she stated that petitioner had destroyed his mattress. This is not true. On August 23, 2006, respondent Nickel reissued the restriction, stating (wrongly) that petitioner had covered his window with his mattress.

E. Inadequate Nutrition

Beginning on September 7, 2005, petitioner was put on a "cold bag meal restriction." His meals were nutritionally inadequate and, as a result, petitioner lost over 20 pounds, was lethargic and unable to exercise. Respondent Nickel was aware of these health effects but refused to remove the meal restriction, in spite of petitioner's requests that she do so. In addition, respondent Suliene was aware of the health effects and would not change petitioner's meal restriction or provide him with medical care to mitigate the effects.

F. Placement in Clinical Observation Status

Respondent Vandenbrook placed petitioner in "Clinical Observation Status" from January 13, 2006 until January 17, 2006. During this period, petitioner was locked in a "frigid cold" cell that was illuminated 24 hours a day; he was denied clothing and other property, including hygiene items and a mattress and was forced to sleep on the concrete

floor. When petitioner filed a complaint about the conditions, the inmate complaint examiner told him that prison officials were concerned for his safety.

G. Placement in "Full Bed Strap-Down"

Respondent Vandenbrook placed petitioner in a "Full Bed Strap-Down" on November 28, 2005. From 2:00 p.m. that day until 2:30 a.m. the following morning, petitioner was forced to remain naked and strapped to a black rubber mat in an observation cell. Petitioner was very cold, shivering and sore with kidney pain. When respondent Hannisch stopped on one of her rounds to examine petitioner, he asked her to give him clothing and a normal mattress to ease the discomfort of being strapped down. Respondent Hannisch refused and told petitioner that "I have a message for you. Don't have us strap you down and you wouldn't have this problem, would you?" While petitioner was strapped down and naked in the observation cell, several female staff members saw him via a monitoring camera and through the class window in the cell door.

H. Continual Exposure to the Odor of Feces and Urine

For approximately two and a half months beginning on or about January 23, 2006, and ending when petitioner was moved to a different part of the segregation unit, he was exposed to the strong smell of other prisoners' feces and urine. Prisoners in the segregation

unit "smeared feces and urine in the ventilation system" through which the odor emanated. Respondent Salter was aware that this problem created "sickly physical reactions, such as vomiting, dizziness, blurry eyes, sore throat, loss of appetite," yet he did nothing to address "this biohazard condition" and instead chose to avoid the area at all times. (Petitioner does not say whether he experienced all of these symptoms himself or whether the conditions were such that many of the prisoners in the unit experienced these kinds of reactions.)

I. Force Used or Threatened Against Petitioner

Respondent James removed petitioner from his cell twice on November 28, 2005. During the first removal, respondent James pinned petitioner to his bunk. Petitioner was momentarily choked when his neck was pressed on the metal edge of the bunk. As a result, petitioner briefly gasped, felt dizzy and had watery eyes. Respondent Lipinski saw this occur and did nothing to intervene.

On the second occasion that respondent James removed petitioner from his cell on November 28, 2005, respondent James pinned petitioner on the ground and "struck [petitioner] with a closed fist at least 3 times in [his] lower lip causing blood to flow." Petitioner's lip swelled to such a degree that it was painful for him to eat. Respondents Tamminga and Grams failed to properly process, investigate and respond to petitioner's complaints regarding either incident on November 28, 2005.

On June 7, 2006 respondents Bittelman and Neumaier escorted petitioner to his cell from the showers. When doing so, they "threw [him] into the door of another cell, then into the wall, before slamming [him] into the floor face first." This caused petitioner several injuries, including a "torn open" left hip and arm, a cut lip, a slight limp and mild recurring headaches. Respondent Fink watched this happen but did not intervene to stop the "attack." Respondents Tamminga, Nickel and Grams failed to properly process, investigate and respond to petitioner's complaints regarding this incident.

J. Retaliation

On April 12, 2006 respondent Leiser yelled at petitioner and told him that she was "going to have [her] husband bust [petitioner's] head." When petitioner asked respondent Leiser why she was threatening to have her husband hurt him, she told petitioner that it was because he was "messing with her through law" and that she had heard from others that petitioner planned to hurt her. Petitioner understood respondent Leiser to be referring to his plans to file this lawsuit.

DISCUSSION

A. Eighth Amendment

The Eighth Amendment's prohibition on "cruel and unusual punishment" establishes

the minimum standard for the treatment of prisoners by prison officials. "Cruel and unusual punishment," is demonstrated by the "unnecessary and wanton inflictions of pain," including pain that is inflicted "totally without penological justification." Hope v. Pelzer, 536 U.S. 730, 737 (2001). Although this is the general standard that applies to all types of Eighth Amendment claims, it is applied differently depending on the claim involved. For claims involving the adequacy of medical care and general conditions of confinement, the question is whether petitioner suffered from a serious medical need, to which prison officials were deliberately indifferent. Estelle v. Gamble, 429 U.S. 97 (1976). For claims involving allegations of excessive force, the question is whether the prison officials inflicted at least a minimal injury "maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillan, 503 U.S. 1, 6 (1992); Whitley v. Albers, 475 U.S. 312, 321 (1986). Finally, for claims involving conditions of confinement, the question is whether the petitioner has been denied the "minimal civilized measure of life's necessities" and that prison officials did so with a culpable state of mind. Rhodes v. Chapman, 452 U.S. 337, 347 (1981); Farmer v. Brennan, 511 U.S. 825, 847 (1994).

1. Denial of medical care

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). To state an Eighth Amendment claim regarding medical care, a prisoner must plead facts from which it may be inferred that his health problems constitute a serious medical need and that prison officials responded with deliberate indifference to that need. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

a. Medical care for hypertension, kidney cysts, keratonconus and hernia

Petitioner suffers from several physical medical conditions, including hypertension, cysts on his kidneys, keratoconus in his right eye and a hernia. Petitioner does not provide details about the severity of any of these conditions, but all could, in severe form, constitute serious medical needs. Gutierrez, 111 F.3d at 1371 (holding that "serious medical needs" encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which deliberately indifferent withholding of medical care results in needless pain and suffering).

Thus, I must determine whether petitioner's allegations support a claim that respondents were deliberately indifferent to petitioner's serious medical needs. Deliberate indifference in the denial or delay of medical care is evidenced by actual intent or reckless disregard. A prison official has a sufficiently culpable state of mind when the official "knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk." Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) (citing Walker v. Benjamin, 293 F.3d 1030, 1037 (7th Cir. 2002)). To allow a jury to infer deliberate indifference on the

basis of a physician's treatment decision, the decision must be so far afield of accepted professional standards as to imply that it was not actually based on a medical judgment. Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 262 (7th Cir. 1996). Deliberate indifference is a high standard; inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996).

I turn first to the conduct of respondent Suliene, who bore primary responsibility for petitioner's medical care. Petitioner alleges that respondent Suliene refused to treat him for several medical conditions, despite his requests for treatment and examination. Specifically, petitioner asserts that in various ways, respondent Suliene was deliberately indifferent in her treatment of his hypertension and his kidney cysts: she discontinued his prescription for Lisinopril (which he was apparently taking for his hypertension) after he attempted to overdose on it, did not examine petitioner before or after she discontinued his prescription and did not do anything to determine whether petitioner's risk of heart attack or stroke increased following the discontinuance of Lisinopril. In addition, respondent Suliene refused to send petitioner to see his nephrologist at the UW Hospital for assessment and treatment of his kidney problems, in spite of her belief that petitioner would benefit from further assessment, because he was "young" and would "be able to stand it some more."

Respondent Suliene's decision to discontinue petitioner's medication after he

attempted to overdose falls squarely within the bounds of reasonable medical treatment. She was responding to a severe medical condition, and although it may have been wiser for her to have performed a medical examination in advance, her failure to do so would constitute negligence at most. However, her refusal to examine petitioner after the emergency had passed is distinguishable. Petitioner suffered from a serious medical condition, yet respondent Suliene refused, for no apparent reason, to determine whether his hypertension had worsened and his risk of serious complications increased. From this, a reasonable jury could infer that the decision was not based on medical judgment and instead, constituted deliberate indifference. Similarly, a reasonable jury could conclude that respondent Suliene's refusal to treat petitioner's kidney condition or to allow him to see a specialist because "he would be able to stand it some more" constituted deliberate indifference. Petitioner will be granted leave to proceed with respect to his claims that respondent Suliene (1) refused to examine or treat him after she discontinued his hypertension medication; (2) refused to examine, treat or refer him to a specialist for his kidney cysts; and (3) refused to examine or treat him for his keratoconus and hernia.

Petitioner contends also that respondents Ward, Muchow and Cambell were deliberately indifferent with respect to his hypertension because they refused to check his blood pressure weekly, as directed by his doctor at the UW Hospital. In addition, petitioner contends that these defendants altered his medical records to include notations that he

refused treatment and received medical care or exams when he did not. These alleged actions suggest that all three respondents could be found to have exhibited deliberate indifference to petitioner's serious medical need. Thus, at this early stage of the proceedings, petitioner has satisfied the minimum requirements to state an Eighth Amendment claim against respondents Ward, Muchow and Cambell; he will be granted leave to proceed against all three.

b. Mental health treatment

It is well settled that the Eighth Amendment protects the mental, as well as physical, health of prisoners. E.g., Sanville v. McCaughtry, 266 F.3d 724, 734 (7th Cir. 2001); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987). Petitioner alleges that he "has relapsed into a constant cycle of self-abusive behavior" and that, as a result, he has attempted suicide and engaged in "other bizarre behavior." This relapse has been sufficiently severe that prison officials have placed petitioner in clinical observation on several occasions and a "full-bed strap down" on another occasion. Although petitioner does not identify his psychological condition by name, these alleged symptoms are sufficiently severe to establish for screening purposes that petitioner has a serious medical need.

The next question is whether any or all respondents were deliberately indifferent to petitioner's declining mental condition. According to petitioner, respondent Walsh is the chief psychologist at the Columbia Correctional Institution. After she saw petitioner on two

occasions and offered him psychiatric medication (which he declined initially but has since requested), respondent Walsh refused to see petitioner again, ignored his repeated requests for examination and medication and directed respondent Diedrich not to treat petitioner. When petitioner was struggling to cope with loud noises in the segregation unit, he was directed to talk to respondent Walsh to develop coping mechanisms, yet she refused his request for help. If proven, these facts would be sufficient to allow a reasonable jury to infer that respondent Walsh was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and [drew] the inference." Farmer v. Brennan, 511 U.S. at 837. Therefore, petitioner will be granted leave to proceed with respect to his claim that respondent Walsh violated his Eighth Amendment rights when she was deliberately indifferent to his declining mental condition.

Petitioner offers few facts about respondent Diedrich's actions, other than that she was directed by respondent Walsh not to treat him. Because petitioner alleges only that respondent Diedrich was following the specific direction of her superior by not treating him, it cannot be inferred that she exhibited deliberate indifference. Petitioner will be denied leave to proceed against respondent Diedrich.

It does not appear from petitioner's complaint that respondent Vandenbrook was directed by respondent Walsh not to treat petitioner. Rather, petitioner alleges that respondent Vandenbrook was responsible for petitioner's care and has done nothing to

improve petitioner's worsening mental condition. Assuming, as I must, that this is true, respondent Vandenbrook's refusal to take any action to treat a patient whose mental health was spiraling out of control and who requested treatment repeatedly could constitute deliberate indifference. Therefore, petitioner will be granted leave to proceed with respect to his claim that respondent Vandenbrook was deliberately indifferent to petitioner's serious medical need when he refused to offer petitioner any treatment for his declining mental condition.

2. Denial of out-of-cell exercise

Petitioner was in segregation status at the Columbia Correctional Institution for more than 200 days. During this time, respondent Salter and the "disciplinary committee" prohibited petitioner from engaging in any out-of-cell exercise and respondent Tamminga dismissed petitioner's complaints about this decision. As a result, petitioner's mental and physical health declined.

As discussed above, an inmate must allege the existence of an objectively serious injury to which prison officials were deliberately indifferent to state a claim under the Eighth Amendment. Delaney v. DeTella, 256 F.3d 679, 683 (7th Cir. 2001). The Court of Appeals for the Seventh Circuit has stated that a denial of exercise may constitute an objectively serious injury when it is "extreme and prolonged" and "movement is denied to

the point that the inmate's health is threatened." Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1995) (citing Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988)); see also Anderson v. Romero, 72 F.3d 518, 527-28 (7th Cir. 1995)); French v. Owens, 777 F.2d 1250, 1255-56 (7th Cir. 1985). In Delaney, 256 F.3d at 683-84, the Court of Appeals for the Seventh Circuit found that a prisoner stated a constitutional violation after he was placed in a segregation unit for six months and denied any access to out-of-cell exercise during this time. Id. (noting that denial of exercise for shorter periods of time or where prisoner was able to engage in limited exercise would not rise to level of constitutional violation). Here, petitioner was prevented from engaging in any out-of-cell exercise for a longer period of time than the prisoner in Delaney. Although it is not clear whether petitioner was able to exercise within his cell, the facts alleged are sufficient to meet the objective standard necessary to state an Eighth Amendment claim.

The next question is whether petitioner has alleged that respondents Salter and Tamminga were deliberately indifferent to his condition. In the context of a conditions of confinement claim, deliberate indifference is the equivalent of intentional or reckless conduct. Jackson v. Illinois Medi-Car, Inc., 300 F.3d 760, 765 (7th Cir. 2002). To state a claim, an inmate must allege, at a minimum, "actual knowledge of impending harm easily preventable." Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)). "A failure of prison officials to act in such

circumstances suggests that the officials actually want the prisoner to suffer the harm." Id. Petitioner alleges that respondent Salter implemented the restriction on out-of-cell exercise for more than 200 days, which is more than sufficient to state a claim of deliberate indifference. At a later stage respondent Salter may be able to demonstrate that there were legitimate penological reasons for justifying this restriction. See, e.g., Delaney, 256 F.3d at 684. However, at this point, petitioner will be granted leave to proceed on his claim that respondent Salter was deliberately indifferent in subjecting petitioner to an objectively serious deprivation of a basic human need.

I turn now to petitioner's contention that respondents Tamminga and Grams exhibited deliberate indifference when they dismissed petitioner's complaint regarding the denial of out-of-cell exercise. An official is involved sufficiently to establish liability for a constitutional violation "if she acts or fails to act with a deliberate or reckless disregard of petitioner's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761F.2d 360, 369 (7th Cir. 1985). Petitioner alleges that respondents Tamminga and Grams reviewed petitioner's complaints about his exercise restriction and dismissed them. Because the duration and extent of an exercise restriction are determinative with respect to its constitutionality, petitioner may not be able to prevail on his claim against respondents Tamminga and Grams if they were unaware of the extent of the restriction. However, the

facts alleged are enough for petitioner's claim to pass screening and he will be granted leave to proceed against respondents Tamminga and Grmas.

3. Rubber mattress restriction

For several months while he was at the Columbia Correctional Institution, petitioner was given a "black rubber tire mat" in place of a standard mattress. I understand him to contend that this constituted cruel and unusual punishment. Conditions of confinement within a prison may be so severe as to fall below the standard imposed by the Eighth Amendment when a prisoner is denied the "minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). To state such a claim, a prisoner must allege also that the respondents acted with a culpable state of mind. Farmer, 511 U.S. at 847.

The Court of Appeals for the Seventh Circuit has concluded that bedding is a "basic human need" and that its deprivation for a prolonged period may rise to the level of an Eighth Amendment violation. E.g., Gillis v. Litscher, 468 F.3d 488 (7th Cir. 2006). In this case, petitioner was not denied bedding or a mattress; instead, his standard mattress was replaced with one that he found very uncomfortable. As highly unpleasant as this may have been, the Supreme Court's often-quoted advisement bears repeating: "the Constitution . . . does not mandate comfortable prisons." The use of an uncomfortable mattress for several

months is not sufficient to state a claim under the Eighth Amendment. Therefore, petitioner will be denied leave to proceed with respect to his claim that respondent Nickel's imposition of a rubber mat restriction constituted cruel and unusual punishment.

4. Inadequate nutrition

Petitioner contends that respondent Nickel placed petitioner on a "cold bag" meal restriction that was nutritionally inadequate and that this was a constitutionally prohibited condition of confinement. He alleges that, despite the fact that he was losing a significant amount of weight (20 pounds over several months) and asked respondent Nickel to remove the restriction, she refused to do so or improve the meals' nutritional content. In addition, respondent Suliene refused to intervene or provide petitioner with supplemental nutrition.

Prisons have an obligation to "provide nutritionally adequate food." Antonelli, 81 F.3d at 1432 (citations omitted). Petitioner allegations that he lost weight and felt lethargic as a result of the inadequate nutritional content of his meals are sufficient to imply that the meals served to petitioner were not adequate. Further, petitioner has alleged facts from which it can be inferred that respondents Nickel and Suliene were aware of this situation and refused to remedy it, in spite of petitioner's repeated pleas for additional food or supplements. Petitioner will be granted leave to proceed on his claims against respondent Nickel and Suliene that their failure to provide him with nutritionally inadequate meals

violated his Eighth Amendment protections against cruel and unusual punishment.

5. Placement in clinical observation status

Petitioner was placed in "Clinical Observation Status" by respondent Vandenbrook for four days. During this period, petitioner was locked in a "frigid cold" cell that was illuminated 24 hours a day; he was denied clothing and other property, including hygiene items and a mattress; and he was forced to sleep on the concrete floor. The Court of Appeals for the Seventh Circuit has noted that lack of bedding, heat, clothing, sanitation and hygiene materials may violate the Eighth Amendment. Gillis, 468 F.3d 488. When considering whether a prisoner has stated a conditions-of-confinement claim, courts consider not only the nature of the alleged deprivation, but also the duration of that deprivation. E.g., Dixon v. Godinez, 114 F.3d 640, 643 (7th Cir. 1997).

In Gillis, 468 F.3d 488, the Court of Appeals for the Seventh Circuit found that summary judgment was improper when a prisoner had been placed in a "Behavior Modification Program" as a result of a minor rule infraction, stripped of all property for five days and given no bedding and limited clothing and hygiene items for seven days thereafter. Although petitioner's situation is similar to that of Gillis, it exhibits several distinguishable features. First, and most important, by his own admission, petitioner's mental condition and behavior have become worse over time and he has attempted suicide, which may well have

been the reason he was placed in "Clinical Observation Status." Next, petitioner spent four days in "Clinical Observation Status," not almost two weeks. These distinctions may prove determinative after the facts have been developed more fully. However, at this stage, petitioner has alleged enough to state a claim. In addition, petitioner has alleged that respondent Vandenbrook was not only aware of the conditions in which petitioner was placed, but that he ordered them. From this, a reasonable jury could find that respondent Vandenbrook acted with disregard of the substantial risk of serious harm to petitioner. Thus, petitioner will be granted leave to proceed on his claim that respondent Vandenbrook subjected him to unconstitutional conditions of confinement when respondent Vandenbrook placed petitioner in "Clinical Observation Status" for four days.

6. Placement in "full bed strap-down"

Petitioner contends that his placement in a "Full Bed Strap-Down" for more than twelve hours constituted cruel and unusual punishment. From 2:00 p.m. on November 28, 2005 until 2:30 a.m. the following morning, petitioner was forced to remain naked and strapped to a black rubber mat in a cold observation cell. Again, to meet the objective requirement for Eighth Amendment claim "the deprivation alleged must be, objectively, 'sufficiently serious.'" Henderson v. Sheahan, 196 F.3d 839, 845 (7th Cir. 1999). It is unlikely that any single aspect of the "Full Bed Strap-Down" described by petitioner would

be sufficient to state an Eighth Amendment claim. However, a reasonable jury could infer that petitioner's lack of clothing, when combined with a lack of bedding, inadequate heat and severe restrictions on his movement together violate the "evolving standards of decency that mark the progress of a maturing society" described in Rhodes, 452 U.S. at 346.

Petitioner alleges that his placement in a "Full Bed Strap-Down" was directed by respondent Vandenbrook. Further, he alleges that when respondent Hannisch checked on him during rounds, she refused to take any steps to ease his discomfort and instead advised petitioner that "Don't have us strap you down and you wouldn't have this problem, would you?" From this, a jury could infer that both respondent Vandenbrook and Hannish had actual knowledge of the conditions that petitioner was experiencing and refused to take any action to minimize his suffering. Therefore, petitioner has stated facts sufficient to allege an Eighth Amendment violation and will be granted leave to proceed against respondents Vandenbrook and Hannish.

7. Continual exposure to the odor of feces and urine

Petitioner's allegations regarding his exposure to intense and disgusting odors of human feces and urine may be understood in two ways, both of which state cognizable claims under the Eighth Amendment. First, it is possible that petitioner's claim is one regarding inadequate medical care. He alleges that the odor of feces and urine that

permeated the segregation unit where he was housed caused "sickly physical reactions, such as vomiting, dizziness, blurry eyes, sore throat, loss of appetite." Petitioner may mean to allege that he experienced all of these symptoms himself when exposed to the noxious odors. If so, this allegation would be sufficient to establish a serious medical need. Gutierrez, 111 F.3d at 1371 ("serious medical needs" encompass conditions in which deliberately indifferent withholding of medical care results in needless pain and suffering).

Alternatively, petitioner may mean to use this description of inmates' reactions to the odor to illustrate its unabated pungency. If so, it may be inferred that the conditions he complains of are so far afield of current standards of decency that they violate the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man." Hope, 536 U.S. at 738 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)). Petitioner's allegations suggest that this situation was unusually repellant. He does not allege that the segregation unit where he was confined for two and a half months merely had an unpleasant or foul odor, for that is an unfortunate and common consequence of close quarters, but that the stench of other inmates' excrement was so repulsive and pervasive that it caused him and others to experience regularly non-trivial physical reactions. Indeed, petitioner contends that the odor was so disgusting that respondent Salter chose to avoid visiting the unit rather than doing anything to improve the situation or assist petitioner with his resulting medical needs. Therefore, petitioner has alleged that respondent Salter was aware of the conditions and

refused to do anything to improve them or to assist petitioner with his medical needs. Although it may prove challenging for petitioner to prove either that the odor caused his medical conditions, or that it was so objectively odious as to create an unconstitutional condition of confinement, he will be granted leave to proceed against respondent Salter on both alternative theories regarding cruel and unusual punishment under the Eighth Amendment.

8. Force used against petitioner

Petitioner contends that respondent James used excessive force when removing him from his cell twice on November 28, 2005 and that respondent Lipinski "allowed" respondent James to use this force. Further, petitioner contends that respondents Bittelman and Neumaier used excessive force when they threw him into a wall and onto the floor while escorting him from the showers to his cell on June 7, 2006 and that respondent Fink watched this happen and did not intervene. Petitioner alleges also that respondents Tamminga, Nickel and Grams failed to process and investigate his claims in a proper manner.

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain." Rhodes, 452 U.S. at 347. Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive

force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson, 503 U.S. at 6-7. To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. Whitley, 475 U.S. at 321; Outlaw v. Newkirk, 259 F. 3d 833, 837 (7th Cir. 2001).

Petitioner has not provided any information about his own actions during the two cell extractions on November 28, 2005. Therefore, it is difficult to discern whether the force used by respondent James was appropriate. Petitioner alleges that during the first cell extraction respondent James pinned him on a bunk, which caused him to choke momentarily. This suggests that the force used by respondent James was also momentary. Although I recognize that this was upsetting to petitioner, it is not possible to infer from the facts alleged that respondent James used this momentary force "maliciously and sadistically to cause harm." Hudson, 502 U.S. at 6-7. Thus, petitioner will be denied leave to proceed on this claim.

The facts alleged regarding the second cell extraction on November 28, 2005 are more troubling. Although it is conceivable that petitioner's behavior toward respondent James was so aggressive and dangerous that administering three closed-fist blows to the face was an

appropriate response, it is not possible to infer this from the facts alleged. Thus, petitioner will be granted leave to proceed against respondent James on his claim that respondent James's actions during the second cell extraction on November 28, 2005 constituted excessive force under the circumstances. Petitioner does not allege that respondent Lipinski joined in respondent James's action, rather that he failed to intervene to stop it. A prison official may be held liable for a constitutional violation if he or she knows about it and has the ability to intervene, but fails to act. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). Therefore, petitioner will granted leave to proceed against respondent Lipinski for "allowing" respondent James to take such action.

Petitioner will also be granted leave to proceed with respect to his claim that the force used by respondents Bittelman and Neumaier on June 7, 2006 was excessive. Again, petitioner has not provided any facts regarding his actions during the altercation. However, he has alleged that respondents Bittleman and Neumaier "threw [petitioner] into the door of another cell, then into the wall, before slamming [him] into the floor face first" and that this caused several injuries. Respondents' actions may have been excessive or they may have been an appropriate response to petitioner's behavior. However, the facts alleged are sufficient to state a claim of excessive force against respondents Bittleman and Neumaier. Petitioner has also stated a claim with respect to respondent Fink, who petitioner alleges watched the "attack" happen but did not intervene to stop it.

Petitioner will be denied leave to proceed with respect to his claims that respondents Tamminga, Nickel and Grams failed to process and investigate his claims in a proper manner, as these claims do not state a constitutional violation. Instead, I understand petitioner to contend that the grievance process was not carried out according to state regulations. If anything, this would be a state law claim, over which this court declines to exercise supplemental jurisdiction.

B. Due Process

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. A procedural due process claim against government officials requires proof of inadequate procedures as well as 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." In Wilkinson v. Austin, 545 U.S. 209 (2005), the Supreme Court determined that there may be liberty interests in basic life necessities, short of an Eighth Amendment violation, that trigger due process procedural requirements. However, as the Court of Appeals for the Seventh Circuit has noted,

"Wilkinson does not answer the question as to when the denial of life's necessities alone could give rise to a liberty interest but still fall short of violating the Eighth Amendment."

Here, the only deprivations alleged by petitioner that could potentially give rise to due process claims are his placement for four days in observation status and his twelve-hour placement in "Full Bed Strap-Down" status. It is conceivable that as this case progresses, petitioner will be able to prove that the conditions he endured during his placement in these statuses were "atypical and significant" in comparison to the ordinary incidents of prison life in Wisconsin and that he was entitled to process either before his placement or after his placement in these statuses that he did not receive. Therefore, petitioner will be granted leave to proceed in forma pauperis on his claim that respondent Vandenbrook placed him in clinical observation status for four days in January 2006 and in "full bed strap-down" on November 28, 2005, without providing him with procedural due process.

C. Retaliation

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. Id. Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607,

618 (7th Cir. 2000); see also Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons.") State officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future.

To state a claim for retaliation, an inmate petitioner need not allege a chronology of events from which retaliation could be plausibly inferred. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, he must allege sufficient facts to put the respondents on notice of the claim so that they can file an answer. Id. A petitioner satisfies this minimal requirement when he specifies the suit or complaint he filed and the act of retaliation. Id.

I understand petitioner to contend that respondent Leiser retaliated against him for engaging in the constitutionally protected activity of seeking judicial relief when she told him that she was "going to have [her] husband bust [petitioner's] head" because he was "messing with her through law." Petitioner alleges respondent Lieser was referring to his plans to file this lawsuit. If true, this might be sufficient grounds for a retaliation claim, because respondent Leiser's statement could be understood as an effort to chill petitioner's exercise of his right to seek judicial relief in the future. Therefore, petitioner will be granted leave to proceed on a First Amendment claim of retaliation against respondent Leiser.

D. Proper Parties

Finally, petitioner has named several respondents in his case caption about whom he alleges no facts. In a claim under 42 U.S.C. § 1983, the petitioner must allege facts from which an inference may be drawn that each respondent was "personally involved" in the constitutional violation, meaning that he or she either directly participated in the violation or knew about the conduct and facilitated it, approved it, condoned it or turned a blind eye for fear of what he or she might see. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). Because petitioner's complaint is devoid of any allegations regarding the actions of respondents Sandra Sitzman, Matthew Frank and Steve Helgerson, these proposed defendants will be dismissed from this lawsuit.

E. Injunctive Relief

In addition to money damages, petitioner has asked for injunctive relief of an unspecified nature. However, in light of his transfer to the Waupun Correctional Institution, any claim he might have had for injunctive relief is moot. To satisfy the Article III case or controversy requirement for requests for injunctive relief, it must appear that the injury about which the petitioner complains is continuing or that the petitioner is under an immediate threat that the injury complained of will be repeated. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) ("Past exposure to illegal conduct does not in itself show

a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."); Young v. Lane, 922 F.2d 370, 373-74 & n.8 (plaintiffs' requests for injunctive and declaratory relief regarding their exercise of religion are mooted by their transfer from institution where allegedly illegal restrictions took place without a strong showing that they are likely to be transferred back to that institution). Petitioner does not suggest that he is likely to be transferred back to the Columbia Correctional Institution. Therefore, I will dismiss his claims for injunctive relief as moot. However, this decision does not affect petitioner's ability to seek monetary relief for past harms. Olzinski v. Maciona, 714 F. Supp. 401, 411 (E.D. Wis. 1989)(citing Robinson v. City of Chicago, 868 F.2d 959, 966-67 (7th Cir. 1989)) (where petitioner can show only past exposure to allegedly unconstitutional conditions, he has standing to seek monetary relief, but does not have standing to seek injunctive or declaratory relief).

F. 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 should be aware that even if he is unsuccessful in finding a lawyer on his own, that does not mean that one will be appointed for him. At that point, this court must consider whether petitioner is able to represent himself given the legal difficulty of the case, and if he is not, whether having a lawyer 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 simply too new to allow the court to evaluate petitioner's abilities or the likely outcome of the lawsuit. Therefore, the motion will be denied without prejudice to petitioner's renewing his request at a later time.

ORDER

IT IS ORDERED that

1. Petitioner Mark D. Marshall is GRANTED leave to proceed in forma pauperis on his claims that his Eighth Amendment protection against cruel and unusual punishment was violated when:

(a) Respondent Suliene refused to treat petitioner's hypertension, kidney cysts, keratoconus and hernia, refused to examine petitioner after she discontinued his hypertension medication and failed to intervene to provide petitioner with nutritionally

adequate meals;

(b) Respondents Ward, Muchow and Cambell falsified charts and refused to monitor his cardiac function;

(c) Respondent Walsh refused to treat his mental health conditions or prescribe medication for these conditions;

(d) Respondent Vandenbrook refused to treat petitioner's mental health conditions, placed petitioner in "Clinical Observation Status" for four days and placed petitioner in a "Full Bed Strap-Down" for more than twelve hours;

(e) Respondent Salter denied petitioner out-of-cell exercise for more than 200 days and placed petitioner in a segregation unit where he was exposed to the overwhelming odor of human feces and urine;

(f) Respondents Tamminga and Grams failed to intervene when alerted to petitioner's exercise restriction;

(g) Respondent Nickel placed petitioner on a nutritionally inadequate cold-bag meal restriction and refused to lift the restriction;

(h) Respondent Hannish failed to intervene when petitioner was placed in a "Full Bed Strap-Down" for more than twelve hours;

(i) Respondent James used excessive force when removing petitioner from his cell during the second cell extraction on November 28, 2005;

(j) Respondent Lipinski failed to intervene to prevent respondent James from using excessive force against petitioner during the second cell extraction on November 28, 2005.

(k) Respondents Bittleman and Neumaier used excessive force when escorting petitioner from the showers to his cell on June 7, 2006;

(l) Respondent Fink failed to intervene to prevent respondents Bittleman and Neumaier from using excessive force against petitioner when escorting him from the showers to his cell on June 7, 2006; and

2. Petitioner is GRANTED leave to proceed with respect to his claim that respondent Leiser violated his First Amendment rights when she retaliated against him for preparing to file this lawsuit by threatening to have her husband beat him.

3. Petitioner is GRANTED leave to proceed with respect to his claims that his Fourteenth Amendment due process rights were violated when respondent Vandenbrook placed petitioner in "Clinical Observation Status" for four days and placed petitioner in a "Full Bed Strap-Down" for more than twelve hours.

4. Petitioner is DENIED leave to proceed with respect to his claims that:

(a) Respondent Nickel violated his Eighth Amendment rights when she assigned him a rubber mattress to sleep on and refused to lift this restriction;

(b) Respondent James violated his Eighth Amendment rights when he used excessive force when removing petitioner from his cell during the first cell extraction on November 28,

2005; and

(c) Respondents Tamminga, Nickel and Grams failed to properly process, investigate and respond to petitioner's complaints about the two incidents of the alleged use of excessive force.

5. Petitioner's claims against respondents Sandra Sitzman, Matthew Frank, Steve Helgerson and Dana Diedrich are DISMISSED for petitioner's failure to allege their personal involvement in any unconstitutional act.

6. Petitioner's request for injunctive relief is DENIED as moot.

7. Petitioner's request for a telephone conference regarding his current conditions of confinement is DENIED.

8. Petitioner's motion for appointment of counsel is DENIED without prejudice to his renewing it at some later stage of the proceedings.

9. 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.

10. 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.

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

_____12. The unpaid balance of petitioner Mark D. Marshall's filing fee remains $350; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

Entered this 29th day of January, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge