IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MAHLIK D. ELLINGTON,

Petitioner, ORDER

v. 07-C-007-C

WARDEN GREG GRAMS,
CAPTAIN RADTKE, Administrative Captain,
JANEL NICKEL, Security Director,

Respondents.

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This is a proposed civil action for 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 conclude that petitioner is unable to prepay the full fee for filing this lawsuit. Petitioner has made 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. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of

legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

From his complaint and the attachments to it, I find that petitioner has alleged the following facts.

ALLEGATIONS OF FACT

Petitioner Mahlik D. Ellington is an inmate at the Columbia Correctional Institution in Portage, Wisconsin. Respondent Greg Grams is the warden at Columbia, Captain Radtke is an administrative captain and Janel Nickel is the security director.

From September 22, 2006, until November 16, 2006, petitioner was housed in a segregation cell at the Columbia Correctional Institution and made to sleep on a mattress on the floor near the toilet because of overcrowding at the prison. As a result, petitioner suffered neck, back and shoulder pain and psychological injury. On November 16, 2006,

petitioner was given a six-inch bed frame off of the floor. Petitioner has been receiving cortisone, presumably for his pain.

DISCUSSION

Prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement. They must insure that inmates receive adequate food, clothing, shelter and medical care and must protect prisoners from violence at the hands of other prisoners. Farmer v. Brennan, 511 U.S. 825, 832-33 (1994). A constitutional violation occurs only where the deprivation alleged is, objectively, "sufficiently serious," and the official has acted with deliberate indifference to the inmate's health or safety. Id. at 834. To amount to a constitutional violation, conditions of confinement must result in "extreme deprivations" of necessities such as food and shelter. Hudson v. McMillian, 503 U.S. 1, 8-9 (1992). Unfortunately, uncomfortable conditions are "part of the penalty that criminal offenders pay for their offenses against society," Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Thus, conditions of confinement have been held to violate the Eighth Amendment only when they "involve the wanton and unnecessary infliction of pain" or are "grossly disproportionate to the severity of the crime warranting imprisonment." Id. So long as conditions do not fall below contemporary standards of decency, they are not unconstitutional, however restrictive the conditions may be.

Petitioner argues that his cramped sleeping arrangement was so serious and extreme

as to deny him a basic human need. However, petitioner's allegations do not permit the drawing of an inference that he was denied food, clothing or shelter, that he was not denied medical attention or even that he suffered prolonged sleep deprivation as a result of his having to sleep on the floor. He appears simply to object to having had to sleep on a mattress on the floor for approximately eight weeks while he was in segregation status. His allegations do not describe deprivations sufficiently grave to form the basis of an Eighth Amendment violation. Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Powell v. Cook County Jail, 814 F. Supp. 757, 759 (N.D. Ill. 1993).

Petitioner's complaint is accompanied by a motion for appointment of counsel. Because I am denying him leave to proceed in forma pauperis in this action, I will deny his motion for appointment of counsel as moot.

ORDER

IT IS ORDERED that:

1. Petitioner Mahlik D. Ellington's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED and this case is DISMISSED with prejudice because petitioner's claim is legally meritless;

2. Petitioner's motion for appointment of counsel is DENIED as moot;

3 . The unpaid balance of petitioner's filing fee is $346.36; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will be recorded against petitioner pursuant to § 1915(g); and

5. The clerk of court is directed to close the file.

Entered this 30th day of January, 2007.

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