IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ANTHONY CORDOVA,

Petitioner,

v.

MATTHEW J. FRANK, Secretary, GREGORY GRAMS, Warden, RICK RAEMISCH, Office of the Secretary, SANDRA SITZMAN, Health Service Manager, JANEL NICKEL, Security Director, BURT TAMMINGA, Institution Complaint Examiner, MARC CLEMENS, Deputy Warden, JANET WALSH, Psychologist DS 1,CAPTAIN HIGBEE, SERGEANT DELONG, DS1 first shift sergeant, TOM GOZINSKE, Corrections Complaint Examiner, RICKY PLATH, Bldgs and Grounds Supervisor, CAPTAIN DYLON RADTKE, Administrative Cpt., DOCTOR SULIENE, physician, DR. JENS, Psychiatrist, DR. DANA DIEDRICH, Psychiatrist and OFFICER MCCLIMANS, Corrections Officer,

Respondents.

OPINION and ORDER

07-C-172-C

- -

In this civil action for monetary and injunctive relief, petitioner Anthony Cordova, a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, contends that respondents have violated his constitutional rights by confining him under inhumane

conditions and by failing to adequately treat his mental health needs. In an order dated March 29, 2007, I concluded that petitioner does not have the means to make an initial partial payment of the filing fee and that his request for leave to proceed in forma pauperis on his complaint would be taken under advisement. In this order, I will consider whether some or all of petitioner's complaint should be dismissed on the ground that the action is legally meritless, fails to state a claim on which relief may be granted or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). In addition, I will address petitioner's request for class certification, his motion for appointment of counsel, dkt. #3, and his request to amend his original complaint to include additional claims, dkt. #6.

Petitioner's request for class certification will be denied because he is not a lawyer and is not qualified to represent the interests of persons other than himself. Petitioner's request to amend will be denied because he admits that the claims he wishes to add have not yet been exhausted. The motion for appointment of counsel will be denied without prejudice to petitioner's refiling it at a later stage in the proceedings should petitioner be unable to locate a lawyer willing to assist him in litigating this lawsuit.

With respect to petitioner's claims against respondents, he will be granted leave to proceed on his claims that his Eighth Amendment rights were violated when respondents Sitzman and Sulienne exhibited deliberate indifference to his need for treatment of his back

pain; respondents Walsh, Jens and Diedrich exhibited deliberate indifference to his need for mental health treatment; respondents Grams and Plath refused to repair the poorly-sealed windows in his cell, causing his cell to become excessively cold; respondents Radtke, Nickel, Grams and Frank enforced prison policies that required food to be delivered through filthy traps in the bottom of cell doors; and respondent McClimans used excessive force against him, causing injury to his neck and back. Petitioner will be denied leave to proceed on his claims that unidentified respondents violated the rights of other prisoners at the Columbia Correctional Institution by failing to provide them with a prison rule book; forcing some inmates to sleep on the floor for months at a time; strapping some inmates to hard rubber mats; and failing to provide some inmates with adequately warm footwear for outdoor recreation.

Although petitioner's complaint refers to exhibits allegedly attached to it, no exhibits have been submitted to the court. Consequently, I draw the following facts only from the allegations of petitioner's complaint and from petitioner's "memorandum of law," which is attached to the complaint.

ALLEGATIONS OF FACT

A. Parties

Petitioner is an inmate of the Waupun Correctional Institution in Waupun,

Wisconsin. Previously, he was incarcerated at the Columbia Correctional Institution in Portage, Wisconsin.

Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Respondent Rick Raemisch is Deputy Secretary of the Wisconsin Department of Corrections.

Respondent Sandra Sitzman is Health Service Manager at the Columbia Correctional Institution.

Respondent Janel Nickel is Security Director of the Columbia Correctional Institution.

Respondent Burt Tamminga is an institution complaint examiner at the Columbia Correctional Institution.

Respondent Marc Clemens is Deputy Warden of the Columbia Correctional Institution.

Respondent Janet Walsh is a psychologist at the Columbia Correctional Institution.

Respondent Captain Higbee is employed at the Columbia Correctional Institution.

Respondent Sergeant DeLong is a first shift sergeant at the Columbia Correctional Institution.

Respondent Tom Gozinske is a corrections complaint examiner.

Respondent Ricky Plath is the buildings and grounds supervisor at the Columbia

Correctional Institution.

Respondent Captain Dylon Radtke is employed at the Columbia Correctional Institution.

Respondent Doctor Suliene is a physician at the Columbia Correctional Institution.

Respondents Dr. Jens and Dr. Dana Diedrich are psychiatrists at the Columbia Correctional Institution.

Respondent Officer McClimans is a corrections officer at the Columbia Correctional Institution.

B. Allegations Regarding Wrongs Done to Plaintiff

Petitioner suffers from back pain so severe it makes him suicidal. When he was confined at the Wisconsin Secure Program Facility, he was given adequate pain medication, After his transfer to the Columbia Correctional Institution in May 2006, respondent Sulienne changed his medication, forcing him to suffer "for no reason at all." Respondent McClimans "bashed" petitioner, further injuring his back and neck.

The window of petitioner's cell at the Columbia Correctional Institution was poorly sealed. Cold air leaked in during the winter. Petitioner contacted respondents Grams and Plath about the problem, but they did not fix it.

Petitioner has requested mental health treatment for years, all "to no avail."

Petitioner has not been placed on a sharps restriction even though he is mentally ill. Because he has not been provided adequate mental health care, petitioner has attempted suicide.

C. General Allegations Regarding the Columbia Correctional Institution

Inmates at the Columbia Correctional Institution are not given a prison rule book but are disciplined when they fail to follow the rules.

Inmates are fed through traps on the bottom of their cell doors. Periodically, prison officials "flood" the tiers of the prison complex but do not disinfect the floors. As a result of the flooding, the traps become caked with feces. They are never cleaned. Although respondents Radtke, Nickel, Grams and Frank had the opportunity to end this practice, they did nothing about it.

There are no double bunks in the cells at the Columbia Correctional Facility. Inmates are sometimes forced to sleep on the floor for weeks or even months at a time when they are placed in segregation.

Respondents Higbee, Delong and Gozinske intentionally place inmates in danger by housing them in cells "with other inmates that have mental disorders, or that don't have mental disorders." Some inmates are strapped down on hard rubber mats.

There are no indoor recreation facilities at the Columbia Correctional Institution. When it is cold, inmates sometimes wrap their feet in plastic or paper to stay warm.

DISCUSSION

A. Class Certification

Although petitioner has named only himself as a petitioner in the caption of his complaint, he has included in the caption the phase "class action." I construe the reference as a request for class certification. From this, I understand him to request certification of this lawsuit as a class action.

> Before the court may certify a class action, four prerequisites must be met:
>
> (1) The class [must be] so numerous that joinder of all members is impracticable, (2) there [must be] questions of law or fact common to the class, (3) the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class, and (4) the representative parties [must] fairly and adequate protect the
> interests of the class.

Fed. R. Civ. P. 23(a). Petitioner does not suggest whom he intends to name as members of his proposed class. However, that omission is of little importance. Absent class members are bound by a judgment whether for or against the class; therefore, they are entitled at least to the assurance of competent representation afforded by licensed counsel. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also King v. Frank, 328 F. Supp. 2d 940, 950 (W.D. Wis. 2004); Huddleston v. Duckworth, 97 F.R.D. 512, 514-15 (N.D. Ind. 1983) (prisoner proceeding pro se not allowed to act as class representative). Because

petitioner is not represented by a lawyer, his request for class certification will be denied.

B. Motion to Amend the Complaint

Shortly after submitting his complaint, petitioner wrote a letter captioned "Re: Consolidation of Civil Complaints," which I construe as a motion to amend his complaint to add 12 additional claims which he is "in the process of exhausting." In Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999), the Court of Appeals for the Seventh Circuit held that a suit must be dismissed when it is brought by a prisoner before his administrative remedies have been exhausted. A district court lacks "discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment." Id. In Ford v. Johnson, 362 F.3d 395, 398-99 (7th Cir. 2004), the court held that a lawsuit is "brought" within the meaning of the exhaustion statute "when the complaint is tendered to the district clerk."

Petitioner acknowledges that he has not exhausted the claims he wishes to add to the lawsuit; therefore, they cannot be heard in this lawsuit. Although he remains free to raise them in a separate suit, he may not raise them in this one. The motion to amend will be denied.

C. § 1915(e)(2) Screening

Although petitioner's allegations are far from clear, it appears that he is contending that his Eighth Amendment rights were violated when (1) respondent Sulienne failed to provide him with adequate pain treatment for his back pain; (2) respondents Grams and Plath refused to repair the poorly-sealed windows in his cell;(3) unidentified respondents (likely respondents Walsh, Jens and Diedrich) failed to provide him with appropriate mental health treatment; (4) respondents Radtke, Nickel, Grams and Frank enforced a prison practice that required inmates to be fed through traps in the bottom of their cell doors; and (5) respondent McClimans used excessive force against him, causing injury to his neck and back. In addition, petitioner asserts that unidentified respondents have violated the rights of other prisoners at the Columbia Correctional Institution by (6) failing to provide them with a prison rule book; (7) forcing some inmates to sleep on the floor for months at a time; (8) strapping some inmates to hard rubber mats; and (9) failing to provide some inmates with adequately warm footwear for outdoor recreation.

1. General allegations

I begin with the last category of petitioner's allegations: that the actions of unidentified prison officials caused harm to other inmates. Although there is reason to doubt that many of the actions petitioner describes violate the Constitution at all, several of his allegations (such as his claim that prison officials strap inmates to rubber mats) may

implicate the Eighth Amendment's prohibition on cruel and unusual punishment. Nevertheless, I must deny petitioner leave to proceed on these claims for two reasons. First, he has not identified the officials responsible for the allegedly unconstitutional actions and has therefore not placed respondents on notice of his claims against them. Second, petitioner alleges that prison officials have wronged "some inmates" who are "sometimes" treated in a way petitioner believes is unconstitutional. Petitioner does not allege that he has been wronged in the ways he describes, and because he has framed his lawsuit as a class action, I understand him to be asserting these claims on behalf of prisoners other than himself. However, as I explained above, petitioner may litigate his own claims only. Because his complaints regarding the Columbia Correctional Institution's practice of failing to provide a prison rule book, forcing some prisoners to sleep on the floor for months at a time, strapping some inmates to hard rubber mats and failing to provide some inmates with adequately warm footwear for outdoor recreation do not appear to relate to actions taken against him personally, he will be denied leave to proceed on those claims.

2. Eighth Amendment claims

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 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). Finally, 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).

a. 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).

The Court of Appeals for the Seventh Circuit has held that "serious medical needs" are not only conditions that are life threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371. Petitioner alleges that he suffers from excruciating back pain and that respondent Sulienne has left him to suffer needlessly. From the facts petitioner has alleged it not clear whether he will be able to show, at a later stage of the proceedings, whether respondent Sulienne was aware of his back pain and deliberately failed to treat it. For now, however, petitioner has done enough to state a claim against respondent Sulienne under the Eighth Amendment.

Petitioner alleges also that he has requested mental health treatment "for years, to no avail." Although petitioner does not identify specific respondents to this claim, he has named as respondents to his lawsuit psychologist Walsh and psychiatrists Diedrich and Jens. Construing petitioner's complaint liberally, as I must, I understand petitioner's claim for lack of mental health treatment to be directed to respondents Diedrich, Jens and Walsh.

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). If it is true, as petitioner

alleges, that he is mentally ill to the point of being suicidal (and petitioner's litigation in prior lawsuits suggests this may be so, see e.g., Cordova v. Frank, Case No. 05-C-487-C, 2005 WL 2206791 (W.D. Wis. Sept. 12, 2005)), then he has a serious medical condition that may warrant treatment. If respondents were aware of petitioner's mental illness and refused to provide him with minimally adequate treatment, then petitioner's rights under the Eighth Amendment would have been violated. Consequently, I will grant petitioner leave to proceed on his claim that respondents Walsh, Diedrich and Jens were deliberately indifferent to his need for mental health treatment.

b. Conditions of confinement

Next, I understand petitioner to contend that his Eighth Amendment rights were violated when respondents Grams and Plath refused to repair the poorly-sealed windows in his cell and respondents Radtke, Nickel, Grams and Frank enforced a prison practice that requires inmates to be fed through traps in the bottom of their cell doors. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." Farmer v. Brennan, 511 U.S. 825, 832 (1994). In order to constitute cruel and unusual punishment under the Eighth Amendment, conditions of confinement must be extreme. General "lack of due care" by prison officials will never rise to the level of an Eighth Amendment violation

because "it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." Whitley v. Albers, 475 U.S. 312, 319 (1986).

To demonstrate that prison conditions violated the Eighth Amendment, a petitioner must allege facts that satisfy a test involving both an objective and subjective component. Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994). The objective analysis focuses on whether prison conditions "exceeded contemporary bounds of decency of a mature, civilized society." Id. The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to petitioner. Id.

"Prisoners have a right to protection from extreme cold." Antonelli v. Sheahan, 81 F.3d 1422, 1433 (7th Cir. 1996); Murphy v. Walker, 51 F.3d 714, 720-21 (7th Cir. 1995). Although it is not clear that the conditions in petitioner's cell were extreme enough to warrant his invocation of the Eighth Amendment, at this stage of the proceedings he has done enough to state a claim against respondents Grams and Plath under the Eighth Amendment.

Petitioner alleges that guards at the Columbia Correctional Institution passed meal trays to all prisoners through traps located at the bottom of the prisoners' cell doors. According to petitioner, because the floors of the cells were dirty, it was unsanitary to deliver food in this way. Petitioner complained to respondents Radtke, Nickel, Grams and Frank;

however, they did nothing.

It seems unlikely that meal trays were delivered to petitioner uncovered, in a way that would permit his food to become contaminated by fecal matter. However, petitioner has said enough to put respondents on notice of his claim against them. If, as petitioner alleges, prison officials provided him with contaminated food, knowing that by doing so they were endangering his health, they may have violated the Eighth Amendment. Consequently, petitioner will be granted leave to proceed on his claim that respondents Radtke, Nickel, Grams and Frank violated his Eighth Amendment rights by requiring food to be delivered through traps in the bottom of cell doors, knowing that the traps were unsanitary.

c. Excessive force

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).

I understand petitioner to contend that respondent McClimans used excessive force against him, by "bashing" him resulting in injury to petitioner's neck and back. Although petitioner has omitted facts regarding the context in which he was "bashed" by respondent McClimans that would help the court better evaluate the legitimacy of his claims, at this stage of the proceedings, I must draw all possible inferences in petitioner's favor. Doing so, it is possible to imagine that petitioner did nothing to provoke respondent McCliman's excessive response toward him.

Nevertheless, petitioner's allegations are so vague that it may well be difficult for respondent McCliman to identify the incident that gave rise to petitioner's claim. Rule 8 of the Federal Rules of Civil Procedure requires litigants to provide a short, plain statement of their claims, sufficient to alert defendants to the charges being made against them. Petitioner has not done that here; therefore, I will stay a decision on whether he may proceed on his claim against respondent McClimans and give plaintiff until May 1, 2007 in which to submit a supplement to his complaint, identifying in more detail the incident in which McClimans allegedly "bashed" him. If, by May 1, 2007, petitioner fails to provide such a supplement, his request to proceed against respondent McClimans will be denied.

D. Appointment of Counsel

Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993) (quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). The Court of Appeals for the Seventh Circuit will find such an appointment reasonable where the plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

The Court of Appeals for the Seventh Circuit has held that before a district court can consider a motion for appointment of counsel made by an indigent plaintiff in a civil action, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, a petitioner is required to submit the names and addresses of at least three lawyers that he asked to represent him and who turned him down. Petitioner has not complied with

this preliminary step. Consequently, I must deny his motion. Petitioner remains free to renew his motion after he has sought representation from at least three lawyers without success.

ORDER

IT IS ORDERED that petitioner Anthony Cordova's

1. Request for class certification is DENIED;

2. Motion to amend his complaint is DENIED;

3. Request for leave to proceed in forma pauperis is

a) GRANTED with respect to petitioner's claims that his Eighth Amendment rights were violated when

i) respondent Sulienne exhibited deliberate indifference to his need for treatment of his back pain;

ii) respondents Walsh, Jens and Diedrich exhibited deliberate indifference to his need for mental health treatment;

iii) respondents Grams and Plath violated his rights refused to repair the poorly-sealed windows in his cell, causing his cell to become excessively cold; and

iv) respondents Radtke, Nickel, Grams and Frank violated his Eighth Amendment rights by enforcing prison policies that required food to be delivered through

filthy traps in the bottom of cell doors.

b) DENIED with respect to petitioner's claims that unidentified respondents violated the rights of other prisoners at the Columbia Correctional Institution by failing to provide them with a prison rule book; forcing some inmates to sleep on the floor for months at a time; strapping some inmates to hard rubber mats; and failing to provide some inmates with adequately warm footwear for outdoor recreation.

c) STAYED with respect to petitioner's claim that respondent McClimans used excessive force against him, causing injury to his neck and back. Petitioner may have until May 1, 2007 in which to submit a supplement to his complaint, identifying in more detail the incident in which McClimans allegedly "bashed" him. If, by May 1, 2007, petitioner fails to provide such a supplement, his request to proceed against respondent McClimans will be denied.

4. Motion for appointment of counsel is DENIED without prejudice.

5. Respondents Matthew Frank, Janel Nickel, Burt Tamminga, Marc Clemens, Captain Higbee, Sandra Sitzman, Sergeant DeLong, Tom Gozinske, Dylon Radtke and Officer McClimans are DISMISSED from this lawsuit.

6. 4. 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' lawyer.

6. 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.

7. The unpaid balance of petitioner's filing fee is $350.00; 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).

8. 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 respondents.

Entered this 18th day of April, 2007.

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