

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RAYMOND C. KELLEY,

Petitioner,

v.

WILLIAM POLLARD, Warden; MICHAEL
BAENEN, Deputy Warden; PETER ERICKSEN,
Security Director; SARAH COOPER,
Segregation Programs Supervisor;
WILLIE SWIEKATOWSKI, Segregation
Security Supervisor; DR. MALEAH CUMMINGS,
Segregation Psychologist; MICHAEL MOHR, Inmate
Complaint Examiner; TOM GOZINSKE, Correction
Complaint Examiner; AMY SMITH, Deputy Secretary,
Wisconsin Dept of Corrections; MARK ZIMONICK,
Segregation Social Worker; DR. McQUEENEY.
Psychiatrist; STEVEN SCHMIDT, Psychological
Services Unit Supervisor; in their individual capacities,

Respondents.

ORDER

08-cv-535-slc¹

In this civil action for monetary relief brought under 42 U.S.C. § 1983, petitioner

¹Because the parties have not yet consented to the magistrate judge's jurisdiction to decide dispositive questions in this case, I am ruling on the question whether petitioner may proceed with his amended complaint presently before the court.

Raymond Kelly alleges that his rights under the Eighth and Fourteenth Amendments were violated when he was denied treatment for his mental illness, subjected to ongoing unsanitary conditions and denied due process before he was placed in a modified behavior program. In an order issued on October 6, 2008, I denied petitioner's request for leave to proceed in forma pauperis and dismissed his initial complaint for his failure to comply with Fed. R. Civ. Pro. 8. However, I offered plaintiff an opportunity to amend his complaint in order to conform to Rule 8.

Now before the court is petitioner's proposed amended complaint, in which petitioner has addressed a number of the deficiencies in his earlier complaint. Because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the court to screen the complaint and deny petitioner's request for leave to proceed if his complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a respondent is immune from such relief. 28 U.S.C. § 1915(e)(2).

Petitioner's request to proceed in forma pauperis will be granted in part and denied in part. In his amended complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties.

Petitioner Raymond G. Kelley is and was at all times relevant to this suit an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin.

Respondents Peter Ericksen, Sarah Cooper, William Swiekatowski, Dr. Maleah Cummings, Mark Zimonick and Dr. Steven Schmidt work at the Green Bay Correctional Institution and are members of the Multi-Disciplinary Segregation Review Team. Respondent Ericksen is the security director. Respondent Cooper is the segregation programs supervisor. Respondent Swiekatowski is the segregation security supervisor. Respondent Cummings is the segregation psychologist. Respondent Zimonick is the segregation social worker. Respondent Schmidt is the psychological service unit supervisor. Respondent Michael Mohr is the inmate complaint examiner and respondent Dr. McQueeney is a psychiatrist at the Green Bay Correctional Institution. Respondent Tom Gozinske is a corrections complaint examiner at the Wisconsin Department of Corrections in Madison, Wisconsin. Respondent Amy Smith is deputy secretary of the Wisconsin Department of Corrections in Madison, Wisconsin.

B. Petitioner's Mental Health History

Petitioner has been admitted into mental health treatment centers for psychosis, violence, explosive disorders, post-traumatic stress disorder and depression. He has a history of suicide attempts and has been on medication for his mental illness for some time. Since being incarcerated, petitioner has had 25 mental health placements for suicidal or homicidal ideation and has been admitted to the hospital countless times for these attempts. Respondents Ericksen, Cooper, Swiekatowski, Cummings, Zimonick and McQueeny knew about petitioner's mental health problems and history of suicide attempts.

C. Behavior Modification Program

_____ On May 7, 2007, petitioner had a psychotic episode, overdosed and brandished a shank made out of a toothbrush. He was gassed, transferred to a hospital and placed on observation. While petitioner was on observation, respondents Cummings, Swiekatowski and Ericksen made comments to him that he would "pay" for his disrespect and behavior. On May 14, 2008, respondents Ericksen, Cooper, Swiekatowski and Cummings placed petitioner on a behavior modification program without any notice or hearing. Petitioner was on the program until mid-September 2008.

D. Conditions in Behavior Modification Program

1. Personal hygiene

Between May 7, 2008 and June 9, 2008, petitioner was given only one shower, which lasted five minutes, and was not allowed to clean his cell or have it cleaned. Between May 7, 2008 and mid-September 2008, petitioner was allowed to brush his teeth only once and was given no soap, shampoo, face towel or other means to clean himself, except a thin sliver of soap on rare occasions. Because he could not clean himself, petitioner had dirt in the crevices of his body, fungus on his feet, filth in his hair and “reeked powerfully.” Also, petitioner was not allowed to shave or clip his nails until mid-August or to cut his hair until early September. Because petitioner was given very little tissue paper daily, he would straddle his sink and employ it as a bidet to clean himself. In late June, he was allowed to have legal papers and used them to clean himself.

From May 7, 2008 until September 3, 2008, petitioner was allowed only a heavy smock for clothing and it was not changed or cleaned for the first month and a half. During this time he was given no bedding, mattress or pillow, except a seg blanket, which was abrasive.

Petitioner told respondents Swiekatowski, Cooper, Cummings, Zimonick and Ericksen about these conditions when he flagged them down as they passed his cell. Respondents took no action with regard to any of these complaints.

2. Food

Petitioner has been on bag meals for some time. When he receives his meals, the bag is usually quite wet from the contents and falling apart. On June 27, 2008, respondents Swiekatowski, Cooper and Ericksen directed unit staff to begin sliding petitioner's food under his cell door and on the floor. As a result, the food would either spill out or collect dust, dirt, old food remnants, hair and "other business" on the floor. After petitioner filed a complaint, respondent Swiekatowski directed the officers to place the food on a piece of paper when sliding it under his door. This did not solve the problem.

On August 26, 2008, petitioner protested the placement of his food on the floor by cutting his wrists and hanging himself. When prison officials came into his cell, he untied the noose and engaged in a stand off, forcing them to use an incapacitating agent on him. Petitioner swore that he would continue acting out in this way until prison officials stopped forcing him to eat off the floor. Since then he has not had to eat off the floor.

3. Effects of behavior modification program

Since being placed on the behavior modification program, petitioner has suffered more frequent spells of psychosis and has engaged in more acts of self-harm, cutting, biting, overdosing and asphyxiating. On one occasion, petitioner used the natural fixtures of his cell to cut his wrists and arms. In a subsequent episode, petitioner pulled a thread from his

smock and used a sharpened insert from a pen as a needle to tie his wrists together and then rip his flesh. Petitioner's depression and suicidal tendencies have increased.

As a result of having no shoes or socks while on the behavior modification program, petitioner has developed painful blisters. Because of the lack of a mattress, pillow, bedding and inactivity, he has been unable to sleep and his neck, shoulder, back, pelvic area and joints hurt. Also, petitioner has developed migraines and very intense jaw pain.

E. Conspiracy to Deny Psychological and Psychiatric Treatment

Before and during his placement on the behavior modification program, respondents Cummings and McQueeney removed petitioner from his psychotropic medications and refused to reissue them. In mid-August, petitioner was seen by a different psychiatrist who reissued petitioner's anti-psychotic medication. Once respondent Cummings discovered that petitioner's medications were reissued, she informed petitioner that she and respondent McQueeney had agreed that petitioner should receive no medications while on the behavior modification program. (Petitioner does not allege whether respondents Cummings and McQueeney have actually denied him medication.)

DISCUSSION

As an initial matter, petitioner's complaint does not allege that defendants William Pollard, Michael Baenen, Michael Mohr, Tom Gozinske, Amy Smith and Steven Schmidt had any personal involvement in any of the alleged violations. It is well established that liability under § 1983 must be based on a respondent's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987). Only persons who cause or participate in a constitutional violation are responsible.

Petitioner's reason for naming respondents Pollard, Baenen and Schmidt appears to be that they failed to intervene once they knew that petitioner had been placed in the behavior modification program and that they are members of the multi-disciplinary segregation review team. He does not allege that they were involved in placing him in the program or that they knew of the conditions he endured while on the program. Also, petitioner appears to be suing respondents Pollard, Mohr, Gozinske and Smith because they learned about the alleged violations when petitioner filed his inmate grievances. In neither instance does petitioner allege or imply that respondents had any personal involvement in the alleged constitutional violations at the time they occurred. Therefore, petitioner fails to state a claim against these respondents and will be denied leave to proceed in forma pauperis

against them.

A. Due Process

Petitioner alleges that respondents Ericksen, Cooper, Swiekatowski and Cummings violated his right to due process when they placed him in the behavior modification program without giving him notice of the action or a hearing. 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). To succeed on his due process claim, petitioner must establish that the behavior modification program imposed an “atypical and significant hardship on [him] in relation to the ordinary incidents of prison life,” Sandin v. Conner, 515 U.S. 472, 484 (1995), that required some form of pre-deprivation process. Gillis v. Litscher, 468 F. 3d 488, 491 (7th Cir. 2006). Although there is no clear test for determining when changes in a prisoner’s sentence rise to the level of a constitutional violation, the Seventh Circuit has found that placement in a program that severely restricts a prisoner’s access to certain basic necessities such as hygiene and warmth for an extended period of time might be sufficient to warrant procedural protections. Gillis, 468 F. 3d at 491.

The allegations in petitioner's complaint are similar to those that the Seventh Circuit recognized as sufficient to state a claim under the due process clause in Gillis, 468 F. 3d at

491. A prisoner was deprived of due process before being placed on a behavior modification program that proceeded in three stages and was intended to last for 15 days. Id. at 490. At the first stage, which lasted for five days, the prisoner alleged that he was forced to sleep naked in his cell and received toilet paper on only five occasions. Id. at 490-91. At the second stage, which lasted for five days, the prisoner was given a seg smock, toothpaste and a toothbrush, but was denied soap, bedding or a mattress. Id. at 491. In addition, he was not allowed to shower for a period of nine days. Id.

In this case, petitioner alleges that he received no process before being placed in the behavior modification program. Further, petitioner further alleges that he was denied a shower, soap or a towel for a month. Over the course of four months, he was denied access to bedding or a mattress and was allowed to brush his teeth and cut his hair and nails once. Petitioner's claims are sufficiently similar to those in Gillis to state a claim for denial of due process rights. Petitioner will be granted leave to proceed on this claim.

B. Eighth Amendment: Conditions of Confinement

Although there is no definitive test to determine whether conditions of confinement are cruel and unusual under the Eighth Amendment, the treatment to which a prisoner is subjected must be measured according to "the evolving standards of decency that mark the progress of a maturing society." Rhodes v. Chapman, 452 U.S. 337, 346 (1981). Petitioner

must allege facts showing both an objective and subjective component. The objective component is satisfied when a petitioner alleges facts showing that the conditions were extreme and fell below “the minimal civilized measure of life's necessities.” Rhodes, 452 at 347. 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). The subjective element requires a petitioner to allege facts showing that prison officials acted wantonly and with deliberate indifference to a risk of serious harm. Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994).

Petitioner’s allegations state a claim under the Eighth Amendment. The conditions of his confinement are similar to those the Seventh Circuit found sufficient to survive a motion for summary judgment in Gillis, 468 F.3d at 493, as noted above.

Further, petitioner has alleged that respondents Ericksen, Cooper, Swiekatowski, Cummings and Zimonick were made aware of the conditions of his confinement, but failed to take any action to address or improve these conditions. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003)(individuals liable under § 1983 for violations they knew of); Vasquez v. Raemisch, 480 F. Supp 2d 1120, 1133-34 (W.D. Wis. 2007).

C. Eighth Amendment: Deliberate Indifference

Petitioner alleges that respondents Cummings and McQueeney were deliberately indifferent to his mental health needs in violation of the Eighth Amendment when they refused to allow him medication before and during his placement on the behavior modification program. With respect to medical care, the Supreme Court has held that to state an Eighth Amendment claim “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976). This standard contains objective and subjective components. First, an inmate's medical needs must be objectively serious. A condition meets this standard if it is “one that has been diagnosed by a physician as mandating treatment.” Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005). Petitioner has alleged facts suggesting that his mental illness requires medication, which evinces that it was objectively serious.

The subjective element requires that the prison official act with a sufficiently culpable state of mind. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). This state of mind, known as deliberate indifference, requires at a minimum that a prison official be aware of and disregard a substantial risk to the inmate's health. Greeno, 414 F.3d at 653. In other words, the official “must ‘both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists’ and ‘must also draw the inference.’” Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). Because respondents are doctors

who treated petitioner and have access to petitioner's medical file and history of mental illness, they knew that petitioner was previously on medication and made a decision to cease his medication. Although deliberate indifference requires that respondents' actions constituted a substantial risk to petitioner's health, at this stage of the litigation I will let petitioner proceed on this claim.

ORDER

IT IS ORDERED that:

1. Petitioner Raymond Kelley's request for leave to proceed in forma pauperis on his claim that respondents William Pollard, Michael Baenen, Michael Mohr, Tom Gozinske, Amy Smith and Steven Schmidt violated his Eighth and Fourteenth Amendment rights is DENIED;

2. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents Peter Ericksen, Sarah Cooper, William Swiekatowski and Maleah Cummings violated his right to due process under the Fourteenth Amendment when they failed to give him notice or a hearing before placing him in the behavior modification program is GRANTED;

3. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents Peter Ericksen, Sarah Cooper, William Swiekatowski, Maleah Cummings and

Mark Zimonick violated his Eighth Amendment rights by being deliberately indifferent to unsanitary conditions of confinement is GRANTED;

4. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents Maleah Cummings and Dr. McQueeney violated his Eighth Amendment rights by being deliberately indifferent to his serious mental health needs is GRANTED.

5. Respondents William Pollard, Michael Baenen, Michael Mohr, Tom Gozinske, Amy Smith and Steven Schmidt are DISMISSED from this case for petitioner's failure to allege their personal involvement in violating his constitutional rights.

6. A strike is recorded against petitioner for including in his lawsuit a claim that failed for one of the reasons listed in 28 U.S.C. § 1915(g).

7. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing those respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondents or to

respondents' attorney.

8. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

9. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at Green Bay Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

10. 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.

Entered this 6th day of November, 2008.

BY THE COURT:

_____/s/_____
BARBARA B. CRABB
District Judge