IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KEITH A. JURAK,

Plaintiff,

v.

SGT. KOTTKA; C/O HOOPER;
LT. KELLER; CAP. SALTER;
GREG GRAMS, Warden
of Columbia Correctional Institution;
and SGT. MORRISON;

Defendants.

ORDER

09-cv-446-bbc

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In this lawsuit brought pursuant to 42 U.S.C. § 1983, plaintiff Keith Jurak, a prisoner at the Columbia Correctional Institution in Portage, Wisconsin, alleges that defendants violated his constitutional rights by disregarding a serious risk to plaintiff's health and safety when they left him in a cell naked, without a bed, with a clogged sink filled with debris that made it impossible for plaintiff to eat, and cut off his water supply for two to three days. Plaintiff has requested leave to proceed in forma pauperis and has paid the initial partial filing fee. In addition, plaintiff has filed a motion for appointment of counsel.

Because plaintiff is a prisoner, the 1996 Prison Litigation Reform Act requires the

court to deny leave to proceed if plaintiff has had three or more lawsuits or appeals dismissed for lack of legal merit or 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 who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2). However, plaintiff is also a pro se litigant, which means his complaint will be construed liberally as it is reviewed for these defects. Haines v. Kerner, 404 U.S. 519, 521 (1972).

I will grant plaintiff leave to proceed on his claim of deliberate indifference against defendants Sgt. Kottka, officer Hooper, Lt. Keller, Cap. Salter and Sgt. Morrison. However, I will deny plaintiff's request to proceed against defendant Greg Grams because the complaint fails to suggest that he was personally involved or knew about the condition of plaintiff's confinement. Last, I will deny plaintiff's motion for appointment of counsel because he has failed to show that he has made an effort to secure his own counsel.

In his complaint, plaintiff makes the following allegations of fact.

ALLEGATIONS OF FACT

At all times relevant to this action, plaintiff Keith Jurak was confined in segregation at the Columbia Correctional Institution. On June 5, 2009, plaintiff was placed in cell #24, which had a slow-draining sink. On July 3, 2009, plaintiff's sink was not draining and he informed all the correctional officers that passed his cell about the problem.

On July 5, 2009, plaintiff's sink was still not draining and was now a "brown sink." Plaintiff was given a plunger by defendant Sergeant Morrison to try to unclog the sink but it did not work. When plaintiff removed the plunger, he could see "small debris of brown chunks" in the sink and smelled feces. Plaintiff immediately asked to speak with a sergeant; defendant Kottka came to speak with him. After being told of the situation, Kottka stated "there ain't shit in your sink."

For the remainder of the day, plaintiff was unable to eat his lunch or dinner because of the smell and his inability to wash his hands. Plaintiff's sink filled to the top with filthy water and he covered his window, telling defendant Hooper to call a captain or lieutenant. Twenty minutes later, Hooper cut off the water to plaintiff's toilet and sink. Defendant Lt. Keller ordered a cell extraction and defendant Cap. Salter assisted with the cell extraction. At 8:30 pm on July 5, 2009, plaintiff was placed on control status and escorted to a shower. Later, defendant Keller ordered that plaintiff be returned to cell #24. The sink was still clogged and had residue of feces in it. Plaintiff was placed in the cell completely naked without any bed.

Between July 5 and July 7, 2009, plaintiff was unable to eat because of the awful odor in his cell. In addition, because his sink was full, plaintiff could not drink water, wash his face or hands or brush his teeth. On July 7, plaintiff told corrections officer Witterhole that he was unable to eat, drink or wash because his water had been off since July 5, 2009. Soon

thereafter, plaintiff was given clothes, his sink was fixed and his cell was cleaned.

Plaintiff sent a letter to defendant Grams regarding the conditions of his cell.

DISCUSSION

I understand plaintiff to be asserting that defendants were deliberately indifferent to plaintiff's health and safety when they failed to insure that the sink in his cell properly drained, failed to inspect his sink for fecal debris, left him in a cell with dirty water and cut off the water to his sink on toilet for two days. To state a conditions of confinement claim under the Eighth Amendment's cruel and unusual punishment clause, a prisoner must allege facts from which it may be inferred that the condition complained of is "sufficiently serious" to implicate constitutional protection, and that prison officials acted with deliberate indifference to inmate health and safety. Farmer v. Brennan, 511 U.S. 825, 834 (1994). 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, plaintiff 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 plaintiff. Id.

To satisfy the objective analysis, plaintiff would need to allege conditions evincing a serious disregard for his health. The following kinds of alleged conditions have been found to rise to the level of unsanitary conditions: no toilet, no water for drinking or washing and no mattress, bedding or blankets for a period of three days, Kimbrough v. O'Neil, 523 F.2d 1057, 1058-59 (7th Cir. 1975); a cell infested with cockroaches that crawled over the prisoner's body, Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996); a cell in which there was mold and fiberglass in the ventilation ducts and evidence of severe nosebleeds and respiratory problems, Board v. Farnham, 394 F.3d 469, 486 (7th Cir. 2005); or a cell in which the inmate was "forced to live with 'filth, leaking and inadequate plumbing, roaches, rodents, the constant smell of human waste, poor lighting, inadequate heating, unfit water to drink, dirty and unclean bedding, without toilet paper, rusted out toilets, broken windows, [and] . . . drinking water contain[ing] small black worms which would eventually turn into small black flies,'" Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992).

In this case, although the conditions about which plaintiff complains lasted a short period of time, two to three days, plaintiff's contention that he was deprived of water for a number of days for no apparent reason suggests that he was deprived of a basic human need.

Moreover, this condition was exacerbated by the alleged fact that plaintiff was unable to eat for that same time period because of the stench of the filthy water in his sink. Last, plaintiff complains that he was left in his cell completely naked without any bed or mattress for two days because he covered his window to get the officers to pay attention to his clogged sink. The combination of factors suggests that these conditions denied plaintiff the civilized measure of life's necessities and punished him in a manner disproportionate to his behavior. Therefore, at this stage, plaintiff has alleged sufficient facts that the conditions evince a serious disregard for his health.

As for the subjective component, plaintiff alleges that defendants Morrison, Kottka, Keller, Salter and Hooper were aware that his sink was clogged, filled with fecal debris and failed to take any action to correct these conditions. Morever, defendant Hooper cut of plaintiff's water supply without any apparent reason and defendants Keller and Salter, after removing plaintiff from his cell, returned him to the same cell with the allegedly clogged sink and no running water. Thus, plaintiff has alleged sufficient facts that defendants substantially disregard a risk of harm to his health. For the foregoing reasons, plaintiff states a valid constitutional claim against defendants Kottka, Morrison, Keller, Salter and Hooper.

However, with respect to defendant Grams, there are no allegations in plaintiff's complaint explaining how defendant Grams was involved in violating plaintiff's constitutional rights. It is well established that liability under § 1983 must be based on a

defendant's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). In some instances, it may be appropriate to impose liability on officials whose only involvement in the alleged constitutional violation is the disregard of a complaint or letter sent by a prisoner. If a prisoner complains of a violation that is ongoing and the official has the authority to stop it, but the official ignores the complaint, then there is a strong argument that the official "kn[e]w about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye," which is the standard for imposing liability under § 1983. Id. But an official who does not learn about an unconstitutional act until after the violation is complete cannot be held liable for it. Plaintiff does not allege any facts from which an inference may be drawn that defendant Grams had any knowledge of the conditions plaintiff endured while they were occurring. From plaintiff's complaint, it appears that Grams learned about the conditions only after they had been corrected. Accordingly, I conclude that plaintiff has failed to state a claim against defendant Grams and plaintiff's request for leave to proceed against him will be denied.

With respect to plaintiff's motion to appoint counsel, federal judges have discretion to determine whether appointment of counsel is appropriate in a particular case. Pruitt v. Mote, 503 F.3d 647, 654-56 (7th Cir. 2007). In determining whether to appoint counsel, I must find first that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v.

County of McLean, 953 F.2d 1070, 1071 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers who he asked to represent him in this case and who turned him down. Plaintiff has not met this prerequisite. Moreover, even if it had been submitted properly, the motion is premature. Appointment of counsel is appropriate in those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the petitioner's demonstrated ability to prosecute it. Pruitt, 503 F.3d at 655. It is far too early to make that determination in this case. Accordingly, I will deny his motion without prejudice.

ORDER

IT IS ORDERED that:

1. Plaintiff Keith Jurak's request for leave to proceed in forma pauperis in this action is GRANTED as to his claim that defendants Sgt. Morrison, Sgt. Kottka, Lt. Keller, Cap. Salter and officer Hooper were deliberately indifferent to plaintiff's health and safety in violation of the Eighth Amendment when they left him naked in a cell with no bed, a clogged sink filled with fecal debris and cut off the water to his sink on toilet for two to three days.

2. Plaintiff's request for leave to proceed in forma pauperis in this action is DENIED as to his claims against defendant Greg Grams and his complaint is DISMISSED as to

defendant Grams for failure to state a claim upon which relief may be granted.

3. A strike will be recorded against plaintiff pursuant to § 1915(g) because one or more claims have been dismissed for failure to state a claim upon which relief may be granted.

4. Plaintiff's motion for an appointment of counsel, dkt. #4, is DENIED without prejudice.

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

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

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants Sgt. Morrison, Sgt. Kottka, Lt. Keller, Cap. Salter and officer Hooper. According to this agreement, defendants have 40 days from the date of receipt of the Notice of Electronic Filing of the order stating that the plaintiff can proceed

against the defendants in which to answer the complaint.

8. Plaintiff 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 the Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 20th day of August, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge