IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RANDY McCAA,

OPINION AND ORDER

Plaintiff,

12-cv-61-slc[1]

v.

MICHAEL MEISNER, JANEL NICKEL,
D. MORGAN, BRIAN FRANSON,
TONY ASHWORTH, CAPT. LIPINSKI,
LT. SABISH, DR. LESLIE BAIRD,
DR. PATRICK KUMKE, SGT. MILLONIG, JR.,
C.O. T. BITTELMAN, CO. D. NEWMAIER,
C.O. RATACZAK, C.O. CICHONANOWICZ,
C.O. EBERT and JOHN DOES 1-5,

Defendants.

- -

Pro se plaintiff Randy McCaa has filed a proposed complaint under 42 U.S.C. § 1983 in which he challenges his conditions of confinement at the Columbia Correctional Institution. All of his allegations relate to the failure of prison officials to provide appropriate treatment for his serious mental illnesses. Accompanying plaintiff's complaint are a motion for appointment of counsel and a motion for a preliminary injunction.

[1] I am exercising jurisdiction over this case for the purpose of this order.

Although plaintiff has paid the full filing fee, because he is a prisoner, I must screen his complaint to determine whether it states a claim upon which relief may be granted. 28 U.S.C. §§ 1915(e)(2) and 1915A. Having reviewed the complaint, I am allowing plaintiff to proceed on the following claims:

(a) defendants Michael Meisner and Janel Nickel are failing to provide adequate mental health care to plaintiff and are housing him in conditions that exacerbate his mental illness, in violation of the Eighth Amendment;

(b) on May 8, 2011, defendant Lt. Sabish denied plaintiff's request for medical treatment, in violation of the Eighth Amendment;

(c) defendant Rataczak wrote plaintiff a conduct report for engaging in self harm and placed plaintiff on a "no hygiene" restriction, even though plaintiff could not control his actions; defendants Lt. Sabish and Nickel approved the conduct report; defendants Captain Morgan and Brian Franson found plaintiff guilty and sentenced him to 180 days in segregation; defendant Meisner approved that decision, in violation of the Eighth Amendment;

(d) on June 1, 2011, defendant Leslie Baird refused to speak to plaintiff after plaintiff said, "I'm depress[ed,] I need to check in[to] observation," in violation of the Eighth Amendment;

(e) on June 1, 2011, defendant C.O. Ebert and an unknown officer refused to take

any action after plaintiff told them that he was going to kill himself and needed to be taken to observation, in violation of the Eighth Amendment;

(f) on June 1, 2011, after plaintiff harmed himself, Lt. Sabish refused to provide medical treatment for plaintiff, in violation of the Eighth Amendment, because plaintiff had urinated on the floor of his cell;

(g) defendant Ebert gave plaintiff a conduct report, extending his time in segregation and placing him on a "no hygiene restriction"; Sabish and Nickel approved the conduct report; defendants Morgan and Tony Ashworth found plaintiff guilty and sentenced him to 210 days in segregation, in violation of the Eighth Amendment;

(h) on June 2, 2011, defendants Newmaier, Bittelman, Millonig and Baird refused to provide medical care to plaintiff, in violation of the Eighth Amendment;

(i) on June 2, 2011, defendants Newmaier, Bittelman and Millonig used excessive force against plaintiff;

(j) defendants Nickel, Morgan and Baird subjected plaintiff to excessive cold while he was housed in an observation cell, in violation of the Eighth Amendment;

(k) defendants Nickel and Morgan subjected plaintiff to unsanitary conditions while he was housed in observation, in violation of the Eighth Amendment;

(l) defendants Nickel and Morgan required plaintiff to sleep on a rubber mat, in violation of the Eighth Amendment;

(m) defendants Nickel and Morgan housed plaintiff in conditions that exacerbated his mental illness while plaintiff was in observation.

I am dismissing the complaint as to all other claims and I am denying plaintiff's motion for appointment of counsel and his motion for a preliminary injunction without prejudice to his refiling them at a later date.

OPINION

The allegations in plaintiff's complaint can be grouped into four categories: (1) defendants are not providing him adequate mental health treatment as a general matter; (2) defendants are not responding appropriately when his symptoms become acute; (3) the conditions of the observation cells deprived him of the minimal civilized measure of life's necessities; and (4) while plaintiff was housed temporarily at the Wisconsin Resource Center, staff there rejected his grievances and took two months to respond to them. I will consider each claim in turn.

A. Mental Health Treatment

Plaintiff alleges that he suffers from various mental illnesses, including bipolar disorder, borderline personality disorder and depression, that he is not receiving any treatment for these illnesses, that his conditions of confinement are exacerbating his illnesses

and that defendants Michael Meisner and Janel Nickel, the warden and security director of the prison, have the authority and obligation to provide the treatment that he needs.

Prisoners have a right to receive adequate medical care, Estelle v. Gamble, 429 U.S. 97 (1976), which includes a right to appropriate mental health treatment. Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983); see also Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004) (under Eighth Amendment, "mental health needs are no less serious than physical needs"); but see Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002) (stating in dicta that "suicidally depressed are entitled, at most, to precautions that will stop them from carrying through; they do not have a fundamental right to psychiatric care at public expense"). Adequate care extends not just to things like medication and therapy but also to the conditions of confinement. When these "are so severe and restrictive that they exacerbate the symptoms that mentally ill inmates exhibit," this may result in cruel and unusual punishment. Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1116 (W.D. Wis. 2001).

Accordingly, I will allow plaintiff to proceed on this claim. At summary judgment or trial, plaintiff will have to show that defendants acted with "deliberate indifference," which means that defendants consciously disregarded a serious mental health need by failing to take reasonable measures to provide treatment. Guzman v. Sheahan, 495 F.3d 852, 859 (7th Cir. 2007).

B. Specific Incidents of Self Harm

1. May 8, 2011

On this date, plaintiff says he cut himself eight times on his right arm and swallowed a pen, half a deodorant stick and a tube of toothpaste because he "was feeling hopelessly depress[ed]." Cpt. at ¶ 113. Plaintiff says that defendants violated his rights on this date in three ways: (1) when he told defendant C.O. Rataczak that he wanted to see a psychologist because "was having psychological thoughts," Rataczak told plaintiff that "he will have to wait until Monday because it is late"; (2) after plaintiff harmed himself and was placed in observation status, defendant Lt. Sabish denied plaintiff's request for medical treatment; and (3) defendant Rataczak wrote plaintiff a conduct report for engaging in self harm and placed plaintiff on a "no hygiene" restriction, even though plaintiff could not control his actions; defendants Lt. Sabish and Nickel approved the conduct report; defendants Captain Morgan and Brian Franson found plaintiff guilty and sentenced him to 180 days in segregation; defendant Michael Meisner approved that decision. (Plaintiff does not explain what a "no hygiene" restriction is, but presumably it means that plaintiff was deprived of hygiene items for a period of time.)

With respect to plaintiff's allegation that defendant Rataczak refused his request to see a psychologist, it is well established that prison officials have a duty to protect prisoners from harming themselves as a result of a mental illness. Minix v. Canarecci, 597 F.3d 824,

833 (7th Cir. 2010); Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003). The standard is whether a particular official was aware of a substantial risk that the plaintiff would seriously harm himself, but disregarded that risk by failing to take reasonable measures to abate it. Farmer v. Brennan, 511 U.S. 825 (1994). Plaintiff's allegation does not state a claim under this standard because plaintiff did not tell Rataczak that he needed immediate assistance; he said only that he was having "psychological thoughts." Although it may be that plaintiff *meant* he was having *suicidal* thoughts, that was not what he said and he includes no allegations in his complaint suggesting that Rataczak would have known that there was an emergency. Accordingly, I am dismissing the complaint as to this claim. Collins v. Seeman, 462 F.3d 757 (7th Cir. 2006) (officers were not subjectively aware that prisoner was suicide risk, and thus were not liable for Eighth Amendment violation in connection with his death, where they were informed that prisoner had requested to see crisis counselor, but were not informed that he had said he was suicidal); Matos ex rel. Matos v. Sullivan, 335 F.3d 553, 557 (7th Cir. 2003) (finding that prison mental health professionals lacked knowledge of serious risk when prisoner never said that he felt suicidal).

Defendant Sabish's alleged failure to provide medical care is governed by a similar standard: whether plaintiff was suffering from a serious medical need, Sabish knew that plaintiff had such a need and Sabish disregarded that need. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). Because it is reasonable to infer from plaintiff's complaint that his

injuries were serious enough to require treatment and that Sabish refused to provide any treatment, I will allow plaintiff to proceed on this claim.

Plaintiff's third allegation raises a novel question: is it cruel and unusual punishment to discipline a prisoner for harming himself if the prisoner does so as a result of mental illness? This claim could implicate the Eighth Amendment in two ways. First, plaintiff may mean to contend that it violates the Eighth Amendment to punish someone for behavior he cannot control. Robinson v. California, 370 U.S. 660, 667 (1962) (concluding that statute criminalizing being "addicted to the use of narcotics" violated Eighth Amendment because it is "an illness which may be contracted innocently or involuntarily"); Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006) (statute prohibiting homeless people from sitting, lying or sleeping on public streets and sidewalks violates Eighth Amendment because homeless people cannot avoid doing those things). Second, he may mean to contend that defendants disregarded his mental illness by restricting his hygiene items, which exacerbated his condition, rather than providing him mental health treatment. Jones 'El, 164 F. Supp. 2d at 1116 (when conditions of confinement "are so severe and restrictive that they exacerbate the symptoms that mentally ill inmates exhibit," this may result in cruel and unusual punishment). Although the scope of both of these rights is unclear, I conclude that plaintiff has alleged enough facts to state a claim under both theories.

At summary judgment or trial, plaintiff will have to show with respect to the first

theory not only that he could not control his actions, but that defendants Rataczak, Sabish, Nickel, Morgan, Franson and Meisner *knew* that he could not. Prison officials cannot be held liable under the Eighth Amendment for making a mistake, even one that demonstrates negligence. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996) ("[A] defendant's inadvertent error [or] negligence . . . is insufficient to rise to the level of an Eighth Amendment constitutional violation."); Wilson v. Seiter, 501 U.S. 294, 299-300 (1991) (Eighth Amendment "mandate[s] inquiry into a prison official's state of mind" because word "punishment" in amendment implies "intent requirement"). Further, defendants remain free to argue that the Eighth Amendment does not prohibit prison officials for punishing acts of self harm, even when they are caused by mental illness. With respect to the second theory, plaintiff will have to show that defendants knew that disciplining him would exacerbate his mental illness and that their actions amounted to a conscious disregard of his mental health.

2. June 1, 2011

On this date, plaintiff alleges that he cut his left arm multiple times and swallowed a crayon, a toothbrush and a tube of toothpaste. I understand him to be raising the following claims under the Eighth Amendment: (1) defendant Leslie Baird, a psychologist at the prison, refused to speak to plaintiff after plaintiff said, "I'm depress[ed,] I need to check in[to] observation"; (2) defendant C.O. Ebert and an unknown officer refused to take

any action after plaintiff told them that he was going to kill himself and needed to be taken to observation; (3) after plaintiff harmed himself, Lt. Sabish refused to provide medical treatment for plaintiff because plaintiff had urinated on the floor of his cell; and (4) defendant Ebert gave plaintiff a conduct report, extending his time in segregation and placing him on a "no hygiene restriction"; Sabish and Nickel approved the conduct report; defendants Morgan and Tony Ashworth found plaintiff guilty and sentenced him to 210 days in segregation.

I will allow plaintiff to proceed on each of these claims. A prison official may violate the Eighth Amendment if he fails to take any action after a prisoner states that he is suicidal. Collins, 462 F.3d at 760-61; Woodward v. Correctional Medical Services of Illinois, Inc., 368 F.3d 917, 926 (7th Cir. 2004); Cavalieri v. Shepard, 321 F.3d 616, 620 (7th Cir. 2003); Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001); Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Because that is exactly what plaintiff alleges that defendant Ebert and the unknown officer did, he has stated a claim under the Eighth Amendment. Although it is not clear how severely plaintiff harmed himself, it is reasonable to infer at this stage that his injuries were sufficiently serious to sustain a claim.

Plaintiff does not know the name of one of the officers, but that is not a barrier to proceeding on this claim. "[W]hen the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint,

the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir.1996). Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendant and will set a deadline within which plaintiff is to amend his complaint to include the unnamed defendant.

It is a closer question whether plaintiff may proceed against defendant Baird. Plaintiff did not tell Baird that he was feeling suicidal, only that he was depressed and wanted to be placed in observation. However, particularly because Baird is a psychologist, it is reasonable to infer at this stage that Baird knew that a request for placement in observation is an indication there is a substantial risk of self harm. Accordingly, I conclude that plaintiff has stated a claim as to Baird as well.

Finally, plaintiff's claims regarding Sabish's refusal to provide medical care and Ebert's, Sabish's and Nickel's decision to punish him for engaging in self harm are similar to his claims discussed in the previous section. Accordingly, I will allow plaintiff to proceed on these claims as well.

3. June 2, 2011

On this date, plaintiff alleges that he "stuck a rolled up milk carton up his penis."

When he told defendants C.O. Newmaier and C.O. Bittelman, they refused to provide care for several hours on the ground that plaintiff "shouldn't put it up there." As a means of protest, plaintiff placed his arm through the trap in the cell door and refused to remove it until Newmaier and Bittelman went for help. Defendant Sgt. Millonig arrived on the scene and began to pull and twist plaintiff's arms. Defendants Newmaier, Bittleman and Millonig placed handcuffs on plaintiff and left him like that for "numerous" hours while laughing at him. Defendant Baird arrived later, but Baird refused to provide any help either.

I understand plaintiff to be raising two claims under the Eighth Amendment: (1) defendants Newmaier, Bittelman, Millonig and Baird refused to provide medical care; and (2) defendants Newmaier, Bittelman and Millonig used excessive force against him. With respect to the first claim, it is reasonable to infer at this stage that plaintiff had a serious medical need and that defendants disregarded that need by refusing to provide treatment, so I will allow him to proceed on that claim.

With respect to the excessive force claim, in determining whether an officer has used excessive force against a prisoner in violation of the Eighth Amendment, the question is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320 (1986). The factors relevant to making this determination include:

- the need for the application of force

‣ the relationship between the need and the amount of force that was used

‣ the extent of injury inflicted

‣ the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them

‣ any efforts made to temper the severity of a forceful response

Id. at 321. In Hudson v. McMillan, 503 U.S. 1, 9-10 (1992), the Court refined this standard, explaining that the extent of injury inflicted was one factor to be considered, but the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than a minimal amount of force.

At this stage, it is reasonable to infer that defendants Newmaier, Bittelman and Millonig satisfy this standard. Accordingly, I will allow plaintiff to proceed on an excessive force claim against those three defendants.

4. June 17, 2011

On this date, plaintiff alleges that defendant Cichonanowicz wrote him a conduct report for refusing to turn over his hygiene products upon request and that defendant Captain Lipinski and defendant Nickel approved the conduct report. Plaintiff's claim seems to be that Cichonanowicz was acting unfairly when he ordered plaintiff to turn in his hygiene products. However, the Eighth Amendment does not prohibit every action that a

prisoner may believe is unfair. Because plaintiff does not allege that he was without hygiene products for an extended period of time or that Cichonanowicz gave him an order with which he could not comply, I am dismissing the complaint as to this claim.

C. Conditions of Confinement in Observation Cell

Plaintiff alleges that he was kept in an observation cell for 31 days beginning on June 20, 2011. He includes many allegations about his conditions, but the Supreme Court has stated that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." Wilson v. Seiter, 501 U.S. 294, 305 (1991). Rather, "conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." Id. Accordingly, I understand plaintiff to be raising the following claims about the conditions of confinement in his observation cell: (1) he was subjected to excessive cold in light of the little clothing he was allowed to wear; (2) he was subjected to unsanitary conditions; (3) the cell did not have a bed or chair, only a rubber mat; (4) he was served a "seg loaf" for food; and (5) the conditions of the observation cell exacerbated his mental illness

With respect to his first claim, prisoners have a right under the Eighth Amendment to be free from extreme hot and cold temperatures. Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir.1986). The same Eighth Amendment standard applies to cell temperatures as to other conditions of confinement: whether the temperatures subject the inmate to a substantial risk of serious harm and whether prison officials are deliberately indifferent to that risk. Murphy v. Walker, 51 F.3d 714 (7th Cir. 1995). In assessing whether this standard has been satisfied, a court should consider the temperature's severity, its duration, whether the inmate has alternative means to protect himself from the extreme temperatures, the adequacy of these alternatives and whether the inmate must endure other uncomfortable conditions apart from the severe temperature. Dixon v. Godinez, 114 F.3d 640, 644 (7th Cir. 1997).

Plaintiff alleges that he was naked or wearing only a "suicide gown" while he was housed in the observation cell, that "freezing air" was blowing in the cell, that he did not have a blanket and that defendants Nickel, Morgan and Kumke were responsible for subjecting him to these conditions. (Plaintiff says that Nickel and Morgan controlled the cell temperature, but that Kumke refused to provide a blanket.) That is sufficient to state a claim under the Eighth Amendment. At summary judgment or trial, plaintiff will have to come forward with specific facts showing that defendants disregarded a substantial risk to his health.

With respect to his claim of unsanitary conditions, plaintiff alleges that he was denied all hygiene products, the toilet in his cell was shut off for days at a time, his cell was covered with vomit, feces and urine and his cell was infested with ants and other "unknown bugs." These allegations are similar to allegations in other cases that the Court of Appeals for the Seventh Circuit concluded were sufficient to state a claim under the Eighth Amendment. Vinning-El v. Long, 482 F.3d 923, 923-24 (7th Cir. 2007) (cell floor was covered with water; sink and toilet did not work; walls were smeared with blood and feces; no clothes, mattress, sheets, toilet paper, towels, shoes, soap, toothpaste, or any personal property for six days); Isby v. Clark, 100 F.3d 502, 505-06 (7th Cir. 1996) (prisoner held in segregation cell that allegedly was "filthy, with dried blood, feces, urine and food on the walls") Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)(prisoner alleged that he 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"); Kimbrough v. O'Neil, 523 F.2d 1057, 1058-59 (7th Cir. 1975) (no toilet, no water for drinking or washing and no mattress, bedding or blankets for a period of three days). Accordingly, I will allow plaintiff to proceed on this claim against defendants Nickel and Morgan, the two officials plaintiff says are responsible for the unsanitary conditions.

With respect to plaintiff's claim that he was forced to sleep on a rubber mat, he says that the mat was so uncomfortable that he could not sleep. Although the Eighth Amendment does not necessarily require prison officials to provide inmates an elevated bed, e.g., Mann v. Smith, 796 F.2d 79, 85 (5th Cir.1986); Robeson v. Squadrito, 57 F. Supp. 2d 642, 647 (N.D. Ind. 1999), some courts have stated that life's basic necessities include at least a mattress on the floor, Lyons v. Powell, 838 F.2d 28 (1st Cir.1988); Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981); Oladipupo v. Austin, 104 F. Supp. 2d 654 (W.D. La. 2000). However, even the deprivation of a mattress may not violate the Constitution if the deprivation is short-lived. Antonelli, 81 F.3d at 1430 (no Eighth Amendment claim stated by allegation that inmate had to sleep on the floor for one night). In this case, because plaintiff alleges that he was deprived of a bed or mattress for a month, I will allow him to proceed on this claim.

With respect to plaintiff's claim that he was served "seg loaf" while in observation, prison officials are not constitutionally barred from using food to discipline inmates for rules violations. Although some courts have questioned the penological value of using food as a tool for behavior modification, no court has held that doing so is a violation of the Eighth Amendment in all circumstances. For instance, a number of courts have upheld the practice of feeding inmates "nutra-loaf" for misusing their food or even for disciplinary reasons unrelated to food. LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993); Myers v.

Milbert, 281 F. Supp. 2d 859, 865 (N.D.W. Va. 2003); Beckford v. Portuondo, 151 F. Supp. 2d 204, 213 (N.D.N.Y. 2001). Accordingly, I am dismissing this claim for plaintiff's failure to state a claim upon which relief may be granted.

Finally, plaintiff alleges that the conditions of the observation cell exacerbated his mental illness. Because I have allowed plaintiff to proceed on this claim with respect to the conditions of disciplinary segregation, I will allow him to proceed on this claim as well against defendants Nickel and Morgan.

D. Treatment of Plaintiff's Grievances

Plaintiff alleges that unnamed staff members at the Wisconsin Resource Center took too long to respond to grievances he filed while he was there temporarily and later rejected them unfairly. This allegation does not state a claim upon which relief may be granted. Prison officials may not retaliate against a prisoner for filing a grievance, DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000), but they are under no constitutional obligation to provide an effective grievance system or, for that matter, any grievance system at all. Owens v. Hinsley, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievance procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owens's grievances by persons who otherwise did not cause or participate in the underlying conduct states no

claim."); see also Grieveson v. Anderson, 538 F.3d 763, 772-73 (7th Cir. 2008); Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996). If prison officials prevented plaintiff from completing the grievance process, then defendants cannot prevail on a motion to dismiss the case for plaintiff's failure to exhaust his administrative remedies, Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006); Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002), but plaintiff does not have a separate claim for that conduct.

E. Motion for a Preliminary Injunction

Before a plaintiff can receive preliminary injunctive relief in this court, he must comply with the Procedure To Be Followed On Motions For Injunctive Relief, a copy of which I am including with this order. In particular, plaintiff must file with the court proposed findings of fact supporting his claim and submit with his proposed findings of fact any evidence he has to support his request. In addition, he must show that he meets the standard for obtaining preliminary injunctive relief. River of Life Kingdom Ministries v. Village of Hazel Crest, 585 F.3d 364, 369 (7th Cir. 2009) ("A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. To obtain such relief, the moving party must first demonstrate that it has a reasonable likelihood of success on the merits, lacks an adequate remedy at law, and will suffer irreparable harm.").

In this case, plaintiff did not follow this court's procedures and he included no specific facts in his motion showing that he is entitled to injunctive relief. Most of plaintiff's three-page motion is a summary of the allegations in his complaint. He does not explain in any detail why he believes he needs immediate relief or even the relief that he is seeking. Accordingly, I am denying his motion for a preliminary injunction.

F. Motion for Appointment of Counsel

Plaintiff has moved the court for appointment of counsel and has supported the motion with an affidavit. I am denying the motion as premature. The Court of Appeals for the Seventh Circuit has held that before a district court can consider such motions, it must first find that the petitioner 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 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.

In his motion, the only law firm he identifies as one that he has contacted is Disability Rights Wisconsin. Even with respect to that organization, he acknowledges that it is still reviewing his case. He asks the court to appoint that organization to represent him, but this court has no authority to do that unless the organization volunteers. If plaintiff

wishes to be represented by Disability Rights Wisconsin, he will have to make arrangements with that organization himself. If plaintiff is unable to reach an agreement with the organization and he still wishes to be appointed counsel by the court, he may file a renewed motion, along with copies of letters from at least three lawyers who have denied his request to represent him.

ORDER

IT IS ORDERED that

1. Plaintiff Randy McCaa is GRANTED leave to proceed on the following claims:

(a) defendants Michael Meisner and Janel Nickel are failing to provide adequate mental health care to plaintiff and are housing him in conditions that exacerbate his mental illness, in violation of the Eighth Amendment;

(b) on May 8, 2011, defendant Lt. Sabish denied plaintiff's request for medical treatment, in violation of the Eighth Amendment;

(c) defendant Rataczak wrote plaintiff a conduct report for engaging in self harm and placed plaintiff on a "no hygiene" restriction, even though plaintiff could not control his actions; defendants Lt. Sabish and Nickel approved the conduct report; defendants Captain Morgan and Brian Franson found plaintiff guilty and sentenced him to 180 days in segregation; defendant Meisner approved that decision, in violation of the Eighth

Amendment;

(d) on June 1, 2011, defendant Leslie Baird refused to speak to plaintiff after plaintiff said, "I'm depress[ed,] I need to check in[to] observation," in violation of the Eighth Amendment;

(e) on June 1, 2011, defendant C.O. Ebert and an unknown officer refused to take any action after plaintiff told them that he was going to kill himself and needed to be taken to observation, in violation of the Eighth Amendment;

(f) on June 1, 2011, after plaintiff harmed himself, Lt. Sabish refused to provide medical treatment for plaintiff because plaintiff had urinated on the floor of his cell, in violation of the Eighth Amendment;

(g) defendant Ebert gave plaintiff a conduct report, extending his time in segregation and placing him on a "no hygiene restriction"; Sabish and Nickel approved the conduct report; defendants Morgan and Tony Ashworth found plaintiff guilty and sentenced him to 210 days in segregation, in violation of the Eighth Amendment;

(h) on June 2, 2011, defendants Newmaier, Bittelman, Millonig and Baird refused to provide medical care to plaintiff, in violation of the Eighth Amendment;

(i) on June 2, 2011, defendants Newmaier, Bittelman and Millonig used excessive force against plaintiff;

(j) defendants Nickel, Morgan and Baird subjected plaintiff to excessive cold while

he was housed in an observation cell, in violation of the Eighth Amendment

(k) defendants Nickel and Morgan subjected plaintiff to unsanitary conditions while he was housed in observation, in violation of the Eighth Amendment;

(l) defendants Nickel and Morgan required plaintiff to sleep on a rubber mat, in violation of the Eighth Amendment;

(m) defendants Nickel and Morgan housed plaintiff in conditions that exacerbated his mental illness while plaintiff was in observation.

2. Plaintiff's complaint is DISMISSED as to all other claims for his failure to state a claim upon which relief may be granted. Plaintiff's complaint is DISMISSED as to defendant C.O. Cichonanowicz and John Does 2-5.

3. Plaintiff's motion for appointment of counsel, dkt. #5, and motion for a preliminary injunction, dkt. #7, are DENIED WITHOUT PREJUDICE to plaintiff's refiling them at a later date.

4. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

5. Plaintiff should keep a copy of all documents for his own files. If he is unable to

use a photocopy machine, he may send out identical handwritten or typed copies of documents.

6. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 14th day of March, 2012.

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

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

PROCEDURE TO BE FOLLOWED ON MOTIONS FOR INJUNCTIVE RELIEF

NOTE WELL: **It is the duty of the parties to present to the court, in the manner required by this procedure, all facts and law necessary to the just, speedy and inexpensive determination of this matter. The court is not obliged to search the record for facts or to research the law when deciding a motion for injunctive relief.**

I. NOTICE

A. It is the movant's obligation to provide **actual** and **immediate** notice to the opposing party of the filing of the motion and of the date set for a hearing, if any.

B. The movant must serve the opposing party **promptly** with copies of all materials filed.

C. Failure to comply with provisions A and B may result in denial of the motion for this reasons alone.

II. MOVANT'S OBLIGATIONS

A. It is the movant's obligation to establish the factual basis for a grant of relief.

1. In establishing the factual basis necessary for a grant of the motion, the movant must file and serve:

(a) A stipulation of those facts to which the parties agree; or

(b) A statement of record facts proposed by the movant; or

(c) A statement of those facts movant intends to prove at an evidentiary hearing; or

(d) Any combination of (a), (b) and (c).

2. Whether the movant elects a stipulation or a statement of proposed facts, it is the movant's obligation to present a precisely tailored set of factual propositions that movant considers necessary to a decision in the movant's favor.[2]

   (a) The movant must set forth each factual proposition in its own separately numbered paragraph.

   (b) In each numbered paragraph the movant shall set cite with precision to the source of that proposition, such as pleadings,[3] affidavits,[4] exhibits, deposition transcripts, or a detailed proffer of testimony that will be presented at an evidentiary hearing.

B. The movant must file and serve all materials specified in II. A with the movant's supporting brief.

D. If, the court concludes that the movant's submissions do not comply substantially with these procedures, then the court, at its sole discretion, may deny summarily the motion for injunctive relief, cancel any hearing on the motion, or postpone the hearing.

III. RESPONDENT'S OBLIGATIONS

A. When a motion and supporting materials and brief have been filed and served in compliance with Section II, above, the opposing respondent(s) shall file and serve the following:

   1. Any affidavits or other documentary evidence that the respondent chooses to file and serve in opposition to the motion.

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[2] These factual propositions must include all basic facts necessary to a decision on the motion, including the basis for this court's jurisdiction, the identity of the parties and the background of the parties' dispute. The movant should not include facts unnecessary to deciding the motion for injunctive relief.

[3] The pleadings, however, are not evidence. Therefore, the movant may use the pleadings as a source of facts *only if* all parties to the hearing stipulate to these facts on the record.

[4] Affidavits must be made on personal knowledge setting forth facts that would be admissible in evidence, including any facts necessary to establish admissibility.

2. A response to the movant's statement of proposed findings of fact, with the respondent's paragraph numbers corresponding to the movant's paragraph numbers.

   (a) With respect to each numbered paragraph of the movant's proposed findings of fact, each respondent shall state clearly whether the proposed finding is not disputed, disputed, or disputed in part. If disputed in part, then the response shall identify precisely which part is disputed.

   (b) For each paragraph disputed in whole or in part, the response shall cite with precision to the evidentiary matter in the record or to the testimony to be presented at the hearing that respondent contends will refute this factual proposition.

B. The response, in the form required by III A., above, shall be filed and served together with a brief in opposition to the motion for injunctive relief no later than the date set by the court in a separately issued briefing schedule.

C. There shall be no reply by the movant.

IV. HEARING

If the court determines that a hearing is necessary to take evidence and hear arguments it shall notify the parties promptly. It is each party's responsibility to ensure the attendance of its witnesses at any hearing.

11/24/2008