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

DAVID D. AUSTIN II,

OPINION & ORDER

Plaintiff,

v. 15-cv-525-jdp

JUDY P. SMITH, EDWARD WALL, and REXFORD SMITH,

Defendants.

Pro se plaintiff David D. Austin II is currently incarcerated in the Oshkosh Correctional Institution. He has filed a complaint under 42 U.S.C. § 1983, alleging that the window in his cell is covered by plexiglass, causing his cell to be extremely hot and potentially unsafe, in violation of his Eighth Amendment rights. Dkt. 1. Plaintiff also alleges that his cell conditions constitute unequal treatment in violation of his Fourteenth Amendment rights.

Plaintiff proceeds *in forma paupuris*, Dkt. 2, and has made an initial partial payment of the filing fee as directed by the court. As a next step, I must screen his complaint and dismiss any portion that is legally frivolous, malicious, or fails to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915, 1915A. After considering plaintiff's allegations, I conclude that plaintiff has stated an Eighth Amendment claim and a Fourteenth Amendment claim.

Plaintiff also seeks a preliminary injunction, Dkt. 4, and has moved to proceed as a class action, representing the other inmates in his unit who have similar cell windows, Dkt. 5. I will deny plaintiff's motion for preliminary injunction and his motion to proceed as a class action.

ALLEGATIONS OF FACT

I draw the following facts from plaintiff's complaint and other filings.

Plaintiff is incarcerated in the R-Unit block of the Oshkosh Correctional Institution. R-Unit is a general population unit that houses more than 200 inmates. The cells in R-Unit are "set up like maximum security segregation units with steel doors with traps in them; the showers are in the dayroom area, . . . all the cells are 'wet cells' and access to the windows has been intentionally blocked by screwing a sheet of Plexiglass over the window frame." Dkt. 1, at 7. Because of the lack of ventilation, the cells are 15 to 25 degrees hotter than the temperature outdoors and 10 degrees hotter than the common areas in the prison. Plaintiff is also concerned about his safety in the event of an emergency, such as a fire.

Plaintiff voiced his concerns to defendant Rexford Smith, the R-Unit manager. But Smith did not uncover the windows. Plaintiff then filed grievances on behalf of himself and the other inmates in R-Unit that he claims alerted defendant Judy Smith, the warden of the Oshkosh Correctional Institution, and defendant Edward Wall, the secretary of the Wisconsin Department of Corrections, to the issue. Dkt. 6 and Dkt. 6-1. The institution complaint examiner (ICE) investigated plaintiff's complaints and responded, explaining that state engineers tested the air handlers in the prison and determined that there was sufficient air flow in the cells. Dkt. 6-1, at 6, 16-17. The examiner also noted the prison's accommodations during hot weather: "inmates are encouraged to increase their fluids, [and] to use wet washcloths to moisten skin" during hot weather or heat advisories. Dkt. 6-1, at 6. Inmates also have the option of purchasing personal fans for their cells, which plaintiff has done. Dkt. 7, at 2.

ANALYSIS

Plaintiff alleges that defendants are being deliberately indifferent to the unreasonable health and safety risk posed by the permanently closed windows in his cell, in violation of the Eighth Amendment. He also alleges that sealing the windows in one unit of the prison constitutes arbitrarily unequal treatment in violation of the Fourteenth Amendment. Construing all of the alleged facts in plaintiff's favor, he has adequately alleged both an Eighth Amendment violation and an equal protection violation. Plaintiff's due process claim does not fare as well and he will be denied leave to proceed on that claim.

A. Eighth Amendment

Plaintiff alleges that his health and safety were at risk because the sealed windows in his cell increased the heat and humidity to an uncomfortable level and because, in the event of an emergency, the plexiglass would preclude ventilation or rescue through the window. "Prison conditions may be harsh and uncomfortable without violating the Eighth Amendment's prohibition against cruel and unusual punishment." *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997). And the prison is not required to provide plaintiff "a maximally safe environment." *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001). However, extreme deprivations for prolonged periods of time may constitute violations if they deny inmates "the minimal civilized measure of life's necessities." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (citations and quotation marks omitted). To prove such a violation, plaintiff would have to show that defendants were deliberately indifferent to a substantial risk to his health and safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

Some of plaintiff's safety concerns fail to state a claim. Plaintiff alleges that the plexiglass in front of the bars that would serve as "a secondary, unnecessary barrier to

emergency ventilation or rescue in the event of a natural disaster or fire." Dkt. 6-1, at 1. But regardless of the plexiglass, the bars on plaintiff's windows were designed to prevent escape, whether by emergency rescue or otherwise. Removing the plexiglass would not change that.

But plaintiff's health concerns are sufficient to state a claim. Plaintiff alleges that his cell can be 15 to 25 degrees hotter than the temperature outdoors in the summertime. Construing the facts and reasonable inferences in plaintiff's favor, the excessive heat and humidity in his cell poses a risk of heat-related illness. Plaintiff complained of the conditions and the prison responded by investigating the complaints and highlighting existing accommodations. For example, one of the ICE reports notes that "inmates are encouraged to increase their fluids, [and] to use wet washcloths to moisten skin" during hot weather or heat advisories. Dkt. 6-1, at 6. And plaintiff is allowed to use his fan in the cell. Dkt. 7, at 2. But the reports do not rebut plaintiff's allegation of the excessive heat or explain the need for the plexiglass covering. Although engineers have assessed and approved air flow in the cells, Dkt. 6-1, at 6, 16-17, the actual condition in plaintiff's cell remains a question of fact. And even a fan and wet washcloth may be insufficient when temperatures are high enough.[1] Despite being on notice of the excessive heat, defendants have not yet corrected the problem. Construing plaintiff's complaint liberally, he has stated a claim that defendants were deliberately indifferent to a serious risk of harm and he may proceed on this claim.

Plaintiff has also moved for preliminary injunction based on the alleged risk to his health. Dkt. 4. Although plaintiff will be permitted to proceed on his claim, he has not yet

[1] According to advice from the Centers for Disease Control and Prevention, a fan does not provide adequate protection from heat-related illness when temperatures are in the high 90s. Centers for Disease Control and Prevention, Frequently Asked Questions (FAQ) About Extreme Heat, http://emergency.cdc.gov/disasters/extremeheat/faq.asp (last visited Feb. 17, 2016).

demonstrated a strong likelihood of success on the merits. Nor has plaintiff demonstrated that he will suffer irreparable harm for which he has no adequate remedy at law. *See Turnell v. CentiMark Corp.*, 796 F.3d 656, 661 (7th Cir. 2015) ("A preliminary injunction is an extraordinary equitable remedy that is available only when the movant shows clear need."). At this point in the case, I am not convinced that plaintiff requires the extraordinary equitable remedy of injunctive relief and I will deny his motion.

B. Due process

Plaintiff alleges that defendants violated his Fourteenth Amendment right to due process by placing him in a cell with plexiglass covering the windows without first giving him a hearing. But plaintiff cannot show that he has been deprived of any liberty protected by the due process clause. Plaintiff could succeed on this claim if his confinement imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Plaintiff was housed in the general population, and he does not allege transfer to a more restrictive environment. He alleges only that the plexiglass-covered windows in R-Unit pose an unhealthy condition of his confinement. But the coverings did not deprive plaintiff of any more liberty than general incarceration did. *Marion v. Radtke*, 641 F.3d 874, 876 (7th Cir. 2011) ("The due process clause requires hearings when a prisoner loses more liberty than what was taken away by the conviction and original sentence."). Without a liberty deprivation, plaintiff was not due any process before his placement in R-Unit. He has therefore failed to state a due process claim.

C. Equal protection

Plaintiff also alleges that defendants violated his Fourteenth Amendment right to equal protection by putting him in a worse cell than other similarly situated inmates. He

contends that prisoners who made "a staff member angry, or . . . [were] not liked for whatever reason by staff" got worse cells. Dkt. 1, at 7. Specifically, plaintiff contends that R-Unit cells were more like maximum security segregation units than other general population units, and had plexiglass-covered windows, steel doors, and less desirable bathroom accommodations.

Equal protection requires that similarly-situated people be treated alike. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "[A] mere inconsistency in prison management . . . may not in itself constitute a cognizable equal protection claim." *Durso v. Rowe*, 579 F.2d 1365, 1372 (7th Cir. 1978). But different living conditions based on unlawful discrimination may be unconstitutional. *See DeWalt v. Carter*, 224 F.3d 607, 613 (7th Cir. 2000) ("[I]f prison officials were to allocate T.V. time, visitation privileges, prison jobs, or any of the other privileges prisoners enjoy, on an otherwise illegal or discriminatory basis, their actions would be unconstitutional even though such privileges do not constitute liberty or property interests.").

Plaintiff does not allege membership in a protected class. But he could allege a "class of one" equal protection claim if he were "intentionally treated differently from others similarly situated" for no rational reason. *D.S. v. E. Porter Cty. Sch. Corp.*, 799 F.3d 793, 799 (7th Cir. 2015) (citations and internal quotation marks omitted). Plaintiff contends that he suffered worse conditions of confinement than similarly situated inmates because of illegitimate animus. Of course, animus is not the only possible explanation for the plexiglass and the other features of the cells in R-Unit. But without knowing defendants' reasons for the inconsistency, I cannot determine whether they are rational. *DeWalt*, 224 F.3d at 613 ("[A] court ought not dismiss an equal protection claim on the basis of reasons unrevealed to

the court."). Accordingly, I will allow plaintiff to proceed with his claim that the disparate cell conditions violate his right to equal protection.

D. Class action status

Plaintiff has also moved to proceed as a class action on behalf of 200 or so other prisoners who are housed in cells like his own. Dkt. 5. Before I may certify a class, I must find that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Plaintiff alleges that these prerequisites are satisfied. But plaintiff is not represented by counsel. Therefore, he cannot fairly and adequately protect the interests of the class. *Howard v. Pollard*, No. 15-8025, 2015 WL 9466233, at *2 (7th Cir. Dec. 29, 2015). His motion will be denied without prejudice.

ORDER

IT IS ORDERED that:

1. Plaintiff David D. Austin II is GRANTED leave to proceed on his Eighth Amendment conditions of confinement claim and on his Fourteenth Amendment equal protection claim against defendants Judy P. Smith, Edward Wall, and Rexford Smith.

2. Plaintiff is DENIED leave to proceed on his Fourteenth Amendment due process claim.

3. Plaintiff's motion for preliminary injunction, Dkt. 4, is DENIED.

4. 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 defendants. Plaintiff should not attempt to serve defendants on his own at this time. 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.

5. 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 or lawyers 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.

6. 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 his documents.

7. 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).

8. Plaintiff's motion to proceed as a class action, Dkt. 5, is DENIED, without prejudice.

Entered February 18, 2016.

BY THE COURT:

/s/

_____

JAMES D. PETERSON
District Judge