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

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THOMAS MCKEE,

OPINION and ORDER

Plaintiff,

18-cv-595-bbc

v.

S. WIERENGA, CPS Y. PUSICH, CPS ASHWORTH,
CAPTAIN K. TRITT, PSU CLINICIAN DEBLANC and
CORRECTIONAL OFFICERS JOHN AND JANE DOES 1-10,

Defendants.

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Pro se plaintiff Thomas McKee is incarcerated at the Waupun Correctional Institution. He filed this proposed civil action under 42 U.S.C. § 1983, contending that defendants violated his constitutional rights by subjecting him to a harsh behavior modification plan for several months because plaintiff had mental health problems and suicidal tendencies. Because plaintiff is incarcerated, his complaint must be screened under 28 U.S.C. § 1915A.

After reviewing the complaint, I conclude that plaintiff may proceed with claims under the Eighth Amendments against defendants S. Wierenga, Y. Pusich, Ashworth, Captain K. Tritt, PSU clinician DeBlanc and John and Jane Doe correctional officers, and under the Fourteenth Amendment against defendants Wierenga, Pusich, Ashworth, Tritt and DeBlanc.

Plaintiff alleges the following facts in his complaint.

ALLEGATIONS OF FACT

Plaintiff Thomas McKee is incarcerated at the Waupun Correctional Institution, where all defendants are employed. S. Wierenga is the deputy warden, Y. Pusich and Ashworth are

corrections program supervisors, Captain K. Tritt is the supervisor of the restrictive housing unit, John and Jane Doe correctional officers are assigned to the restrictive housing unit and DeBlanc is a clinician in the psychological services unit.

Plaintiff has a history of self-harm and has attempted to commit suicide on several occasions. On December 1, 2017, plaintiff consumed approximately 120 pills and was taken to the Waupun Memorial Hospital for treatment. Upon his return, plaintiff was assigned to the restrictive housing unit and was placed on clinical observation status by the psychological services unit. Defendants Wierenga, Pusich, Ashworth, Tritt and DeBlanc decided to create and implement a "behavior modification plan" designed to prevent plaintiff from engaging in further self-harm.

As part of the behavior modification plan, plaintiff's property was removed from his cell. He had no clothing, shoes or socks, with the exception of a thin "suicide smock" and "suicide blanket." Plaintiff was placed in a full body restraint suit with his wrists restricted by handcuffs. He was permitted use of his right hand only during meal times and while using the restroom and use of his left hand during showers, twice a week.

On December 19, 2017, plaintiff was still on observation and the behavior modification plan. He wrote to defendant Pusich, asking that his observation status be reviewed. Pusich responded the next day that:

> Obs[ervation] decisions are not made solely depending on one day behavior. In your case prior behaviors exhibited by you when released from OBS are given consideration, because your safety is a priority.

On January 9, 2018, plaintiff wrote to the health service unit that he was developing pain in his neck, back and wrists from being in restraints for so long. The health service unit

responded by advising plaintiff to do "range of motion" exercises. Plaintiff sent a follow-up health service request and note to the security director that he had not been permitted to do range of motion exercises.

On January 27, 2018, plaintiff wrote defendants Ashworth, Pusich and Wierenga, complaining about his observation status. Ashworth responded that plaintiff was being evaluated for appropriate placement and that the behavior modification plan was in place to attempt to stop plaintiff's self-harm attempts. Pusich and Wierenga responded similarly, and advised plaintiff to contact his assigned clinician, defendant DeBlanc, to discuss his progress. On January 28, plaintiff wrote to DeBlanc about his plan and observation status, stating that he was concerned that he was being evaluated only weekly, rather than daily. Plaintiff also did not believe the evaluations were meaningful. DeBlanc responded that the plan was "in place to assist in progressing you off observation," as "restricting property is helpful for you." He encouraged plaintiff to "[c]ontinue to demonstrate your ability to maintain, and you will progress forward." Defendant Captain Tritt also told plaintiff that his placement in mechanical restraints was not punitive, but was for his own safety. Ultimately, plaintiff remained on observation status without clothing, shoes or socks for 80 days. For 47 of those days, he was in a body suit and mechanical restraints. He was never provided any exercises to alleviate stiffness or soreness that he developed during that time. As a result, he suffered a shoulder injury and urinated on himself.

OPINION

Plaintiff contends that defendants' actions violated his rights to humane conditions of

confinement under the Eighth Amendment and due process under the Fourteenth Amendment. I discuss each of plaintiff's theories below.

A. Eighth Amendment

The Eighth Amendment requires prison officials to provide prisoners with "the minimal civilized nature of life's necessities," including adequate bedding and sanitary conditions of confinement. Farmer v. Brennan, 511 U.S. 825, 834 (1994); Gray v. Hardy, 826 F.3d 1000, 1005 (7th Cir. 2016); Gillis v. Litscher, 468 F.3d 488, 493 (7th Cir. 2006). Prison officials violate the constitution if they are "deliberately indifferent to adverse conditions that deny 'the minimal civilized nature of life's necessities.'" Farmer, 511 U.S. at 834. "[C]onditions of confinement, even if not individually serious enough to work constitutional violations, may violate the Constitution in combination when they have 'a mutually enforcing effect that produces the deprivation of a single, identifiable human need.'" Budd v. Motley, 711 F.3d 840, 842-43 (7th Cir. 2013) (citation omitted).

Plaintiff alleges that he was held in restraints that severely restricted his movement for 47 days and housed without any clothing besides a suicide smock and blanket for 80 days, causing him to develop a shoulder injury and urinate on himself. These allegations suggest that plaintiff was deprived of the "minimal civilized nature of life's necessities." Additionally, his allegations that defendants Wierenga, Pusich, Ashworth, Tritt and DeBlanc were responsible for his conditions and that John and Jane Doe correctional officers refused to provide him any range of motion exercises or other assistance suggest that all of these defendants were aware of the harsh conditions of plaintiff's confinement but acted with deliberate indifference to them.

Therefore, plaintiff may proceed with an Eighth Amendment claim against all defendants. Townsend v. Cooper, 759 F.3d 678, 687 (7th Cir. 2014) (holding that severe behavior modification plan may support Eighth Amendment conditions of confinement claim).

B. Due Process

Plaintiff also contends that defendants violated his right to due process under the Fourteenth Amendment because he was not given any fair process before or after he was placed on observation and the behavior modification plan. To state a due process claim, plaintiff must allege facts suggesting that (1) he had a liberty interest in not being placed on observation status and the behavior modification plan, and (2) his status was administered without procedural protections. Townsend, 759 F.3d at 685; Gillis, 468 F.3d at 491-92.

With respect to the first factor, "'the Fourteenth Amendment provides to inmates a liberty interest in avoiding transfer to more restrictive prison conditions if those conditions result in an 'atypical and significant hardship' when compared to 'the ordinary incidents of prison life.'" Townsend, 759 F.3d at 685 (quoting Sandin v. Conner, 515 U.S. 472, 483-484 (1995)). An atypical and significant hardship may arise when an inmate is placed in segregation for an extended period of time, which is generally considered to be a period of more than 90 days. E.g., Toston v. Thurmer, 689 F.3d 828, 832 (7th Cir. 2012); Lekas v. Briley, 405 F.3d 602, 612 (7th Cir. 2005); Fields v. Achterberg, 2018 WL 1474181, at *4 (W.D. Wis. Mar. 26, 2018). In this instance, plaintiff alleges that he was subjected to the behavior modification plan for 80 days. In light of the harsh conditions he endured during those 80 days, I conclude that plaintiff's allegations are sufficient to show the deprivation of a liberty interest at this stage of the

proceedings.

As to the second factor of plaintiff's due process claim, plaintiff alleges that he was denied any meaningful review during the time he was held on observation and under the behavior modification plan. Although defendants performed checks, he alleges that they intended to keep him on the plan regardless what he said or they observed during those checks. At this stage, plaintiff's allegations suggest that he was denied procedural protections. Townsend,759 F.3d at 688 (discussing whether procedures for evaluating placement on behavior modification plan satisfied due process). His allegations suggest that defendants Wierenga, Pusich, Ashworth, Tritt and DeBlanc would have been responsible for providing him procedural safeguards. Therefore, plaintiff may proceed with his procedural due process claim against defendants Wierenga, Pusich, Ashworth, Tritt and DeBlanc.

ORDER

IT IS ORDERED that

1. Plaintiff Thomas McKee is GRANTED leave to proceed on claims that (1) defendants S. Wierenga, Y. Pusich, Ashworth, Captain K. Tritt, PSU Clinician DeBlanc and John and Jane Doe correctional officers violated his right to humane conditions of confinement under the Eighth Amendment by subjecting him to a severe behavior modification plan; and (2) defendants Wierenga, Pusich, Ashworth, Tritt and DeBlanc violated his right to procedural due process under the Fourteenth Amendment by placing him on the behavior modification plan without adequate procedural protections. Plaintiff is DENIED leave to proceed on any other claim.

2. 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 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.

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

4. 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.

5. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 17th day of October, 2018.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge