

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

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CLIFFORD A. FERGUSON AND  
ROBERT M. AFFELD,

Plaintiffs,

v.

WISCONSIN DEPARTMENT  
OF CORRECTIONS; MICHAEL P.  
SULLIVAN, Former Secretary of the  
Department of Corrections; JON LITSCHER,  
Secretary of the Department of Corrections;  
TRANSCOR AMERICA, INC.; JOHN  
ZIERDT, JR., President/CEO; DAVIE TUCKER,  
Agent Administrator; and JOHN DOES,

Defendants.

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ORDER

00-C-645-C

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiffs Clifford A. Ferguson and Robert M. Affeld are presently confined at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. Plaintiffs have paid the full fee for filing their complaint. However, because they are prisoners and some of the defendants are “employee[s] of a governmental entity,” this court is required to screen the complaint, identify the claims and

dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A(a), (b). This court will not dismiss plaintiffs' case sua sponte for lack of administrative exhaustion. If defendants can show that plaintiffs had available administrative remedies to exhaust their claims against defendant Transcor and its employees and can prove that plaintiffs have not exhausted those remedies with regard to their claims involving the Wisconsin Department of Corrections defendants or the Transcor defendants as required by § 1997e(a), they may allege plaintiffs' lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999). Subject matter jurisdiction is present. See 28 U.S.C. § 1331.

In their complaint, plaintiffs make the following allegations of fact.

## ALLEGATIONS OF FACT

### A. Parties

Plaintiffs Clifford A. Ferguson and Robert M. Affeld are inmates at Fox Lake Correctional Institution in Fox Lake, Wisconsin. Defendant Michael P. Sullivan is the former secretary of the Wisconsin Department of Corrections. Defendant Jon Litscher is the current

secretary of the Wisconsin Department of Corrections. Defendant John G. Zierdt is the president of Transcor America, Inc.. Defendant Davie Tucker is an agent administrator of Transcor America, Inc. Defendant John Does are all participating agents who are employees of Transcor America, Inc. Plaintiffs have also named the Wisconsin Department of Corrections and Transcor America, Inc. as defendants. Defendant Transcor is under contract from defendant Wisconsin Department of Corrections to transport prisoners to and from out-of-state facilities.

B. Plaintiffs Affeld and Ferguson: Transport to Texas (November 3, 1998 to November 4, 1998)

During a trip from November 3, 1998 to November 4, 1998, plaintiffs were subjected to the following conditions during a trip that took approximately 29 hours.

1. Temperature

Temperatures throughout the bus were freezing. The windows were frosted and the agent at the rear of the bus used a blanket while he was wearing his winter jacket. Despite the extreme cold, plaintiffs were subjected to extreme heat because they were seated over the heating unit, causing them to perspire. They became dehydrated because of the lack of

drinking water and chilled when the bus stopped because they were wet with perspiration. This caused plaintiffs to develop colds and constipation.

## 2. Seats and lack of rest

Plaintiffs had to sit on hard fiberglass seats for long periods of time. They sat for approximately 29 hours, with no meaningful rest. This caused extreme fatigue and pain. This is contrary to defendant Transcor's internal management procedures and the contract between defendant Wisconsin Department of Corrections. The contract requires that the prisoners have at least six hours of rest for every eighteen hours of continual road time.

## 3. Bathrooms

Upon boarding the bus, plaintiffs were told that they were allowed to use the bathroom to urinate only and that they could use the bathroom for other purposes at fuel and meal stops. Plaintiff Ferguson suffered humiliation and severe pain because he was forced to hold a bowel movement for over twelve hours despite his continual complaints. Plaintiff Ferguson bled because of his hemorrhoids; although his underwear was soiled, he had to wear the same pair for the remainder of the trip. Plaintiff Ferguson was not allowed to use the bathroom to defecate until the bus arrived in Titus County, Texas, where the agents filled the holding tank

so that the toilet could be flushed after plaintiff Ferguson used it. This was contrary to defendant Transcor's internal management procedures and the contract between defendant Wisconsin Department of Corrections. The contract requires that prisoners not be refused use of a bathroom.

Plaintiff Affeld suffered the same humiliation and pain but for a shorter length of time than plaintiff Ferguson. As a result of the bathroom restrictions, plaintiffs suffered constipation, headaches, loss of appetite and upset stomachs.

The bathroom on the bus was cleaned infrequently, resulting in a stench of urine throughout the entire bus. Because the inmates were forced to use the bathroom while the bus was moving, they urinated on themselves. This added to the smell on the bus, causing plaintiffs to experience nausea, headaches and upset stomachs throughout the entire trip.

#### 4. Drinking water

Plaintiffs were deprived of drinking water for long periods of time. Once the water cooler was empty, the water supply was not replenished for several hours and then it was replenished with a couple of gallons of water only. This amount was insufficient for the 40 prisoners on the bus. Plaintiffs experienced more serious conditions because of their location over the heating unit.

## 5. Medication

Plaintiff Affeld experienced several chest pains but he was not given any of his nitroglycerin pills. It is well documented that plaintiff Affeld has a serious heart condition. This violated defendant Transcor's internal management procedures and the contract between defendant Wisconsin Department of Corrections.

### C. Plaintiff Affeld: Return Trip (July 25, 1999 to August 2, 1999)

On July 25, 2000, an agent for defendant Transcor picked up plaintiff Affeld at Comanche County jail in Texas to transport him back to Wisconsin because of his medical condition. Despite plaintiff Affeld's medical condition, defendant Department of Corrections arranged for him to be transported back to Wisconsin in an extradition van owned by defendant Transcor. During plaintiff Affeld's eight-day trip, he was given four overnight stops. During three of these stops, plaintiff Affeld slept on the floor without blankets or sheets. During the trip, defendant Transcor agents never stayed on the road for fewer than 24 hours at a time. Plaintiff Affeld was subjected to long periods of time in a hot, stuffy van, seated on a bench seat without a seat restraint to protect him from sliding out of his seat every time the van made a sudden stop or turn. While handcuffed and chained to another prisoner, plaintiff slid out of his seat several times and was injured because the van traveled in excess of the speed

limit.

D. Plaintiff Ferguson: Return Trip (June 10, 2000 to June 14, 2000)

On June 10, 2000, plaintiff Ferguson was picked up by defendant Transcor to be transported back to Wisconsin. During the four-day trip, plaintiff Ferguson was given two overnight stops. During the two stops, plaintiff slept on the floor both times, once with a blanket and once with a mattress and a blanket. The van had two bench seats but had no seat restraints to protect the passengers from being thrown from their seats. As a result, plaintiff of injury after being thrown several times when the van traveled at excess speeds and he was injured.

OPINION

A. Defendants

1. Wisconsin Department of Corrections and official capacity claims

Plaintiffs named the Wisconsin Department of Corrections as a defendant in this case. The Supreme Court has held that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989). Furthermore, “[i]t is well-settled that a claim against a state or local agency or its officials may not be premised upon a *respondeat superior* theory.” Rascon v. Hardiman, 803

F.2d 269, 274 (7th Cir. 1986) (citing Monell v. Department of Social Services, 436 U.S. 658, 694 (1978)). “The agency must be culpable in its own right, for example by having a policy of violating such rights.” Bailey v. Faulkner, 765 F.2d 102, 104 (7th Cir. 1985). Throughout the complaint, plaintiffs allege repeatedly that the conditions during their transports were *contrary* to defendant Transcor's internal management procedures and the contract between defendants Transcor and Wisconsin Department of Corrections. Plaintiffs may not proceed against defendant Wisconsin Department of Corrections or any of the defendants in their official capacities.

## 2. Personal involvement: individual capacity claims

In addition, it is well established that liability under § 1983 must be based on the defendant's personal involvement in the constitutional violation. See 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); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). It is not necessary that a defendant participate directly in the deprivation; the official is sufficiently involved “if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent.” Smith v. Rowe, 761

F.2d 360, 369 (7th Cir. 1985). Under this authority, it is clear that defendants Sullivan and Litscher are not liable for the deprivation of any of plaintiffs' constitutional rights because plaintiffs have not alleged that defendants Sullivan or Litscher participated personally in any deprivation of their constitutional rights.

### 3. State actor requirement

For purposes of § 1983 liability, a private entity is deemed to be acting under color of law only when it "is a willful participant in joint action with the State or its agents." See Dennis v. Sparks, 449 U.S. 24, 27-28 (1980). I will allow plaintiffs to proceed against defendants Transcor, Zierdt and Tucker but they will be dismissed if it becomes clear that they do not qualify as state actors for purposes of § 1983 liability.

### 4. Service of John Does

Because plaintiffs do not know the names of all defendants, they will have to conduct formal discovery promptly to uncover the names of the persons they allege are directly responsible for violating their constitutional rights, see Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981), and amend their complaint to include these individuals as defendants. If plaintiffs fail to discover the names of the John Doe defendants, they will be unable to serve

them with their complaint and thus will be unable to recover against them, if recovery is warranted.

#### B. Eighth Amendment

In order to state a claim under the Eighth Amendment, plaintiffs' allegations about conditions during their transfer between prisons must satisfy a test that involves both a subjective and objective component. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). The objective component focuses on whether the conditions “exceeded contemporary bounds of decency of a mature, civilized society.” Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994) (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)). The subjective component focuses on intent: “whether the prison officials acted wantonly and with a sufficiently culpable state of mind.” Lunsford, 17 F.3d at 1579. In prison conditions cases, the requisite “state of mind is one of 'deliberate indifference' to inmate health or safety.” Farmer, 511 U.S. at 834. Deliberate indifference “implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.” Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)). In order to violate the Eighth Amendment, deprivations must be “unquestioned and serious” and

contrary to “the minimal civilized measure of life's necessities.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Reading plaintiffs' complaint liberally, I conclude that plaintiffs have alleged facts sufficient to proceed on an Eighth Amendment claim.

### C. State Law Claims

“[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.” 28 U.S.C. § 1367(a). Pursuant to § 1367(a), I will exercise supplemental jurisdiction over plaintiffs' state law claims.

#### 1. Contract claims

Plaintiffs contend that defendants violated certain provisions of the contract between the Wisconsin Department of Corrections and Transcor America, Inc. As a non-party to the contract, plaintiffs do not have standing to sue for violations of the contract unless they can demonstrate that they are third-party beneficiaries to the contract by showing that the parties to the contract entered into it directly and primarily for their benefit. See Goosen v. Estate of Standaert, 189 Wis. 2d 237, 249, 525 N.W.2d 314, 319 (Ct. App. 1994). “The contract must

indicate that the third-party either was specifically intended by the contracting parties to benefit from the contract or is a member of a class the contracting parties intended to benefit.” Dorr v. Sacred Heart Hospital, 228 Wis. 2d 462, 597 N.W.2d 462 (Ct. App. 1999); see also Restatement (Second) of Contracts § 302(1)(b) (“intended beneficiary” if “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance”). Without the contract language, I cannot determine whether the contract demonstrates that Wisconsin state prisoners, including plaintiffs, were not intended to be third-party beneficiaries. As a result, plaintiffs may proceed on their contract claims at this point.

## 2. Wis. Stat. § 301.03(1)

In addition to their Eighth Amendment claim, it appears that plaintiffs contend that defendants violated their duties under Wis. Stat. § 301.03(1). Section 301.03(1) states that the department shall “Supervise, manage, preserve and care for the buildings, ground and other property pertaining to the state correctional institutions and promote the objectives for which they are established.” Plaintiffs have failed to allege any facts to support a claim under this provision. Plaintiffs' allegations regarding the conditions during their transport are insufficient to demonstrate that defendants violated a right protected under § 301.03(1). This claim under § 301.03(1) will be dismissed for lack of legal merit.

## ORDER

IT IS ORDERED that

1. Plaintiffs Clifford A. Ferguson and Robert M. Affeld may proceed on their Eighth Amendment claim and contract claim against defendants John Zierdt, Davie Tucker and Transcor America Inc.;

2. Plaintiffs' claim under Wis. Stat. § 301.03(1) is DISMISSED for their failure to state a claim upon which relief may be granted;

3. Defendants Wisconsin Department of Corrections, Michael Sullivan and Jon Litscher are DISMISSED as defendants;

4. Enclosed with a copy of this order is a form explaining how plaintiffs are to serve defendants under Rule 4 of the Federal Rules of Civil Procedure and 2 sets of waiver of service of summons forms; and

5. Plaintiffs should be aware of the requirement that they send each defendant and their co-plaintiff a copy of every paper or document that they file with the court. Once plaintiffs have learned the identity of the lawyer or lawyer who will be representing defendants, they should serve the lawyer(s) directly rather than defendants. Plaintiffs should retain a copy of all documents for their own files. The court will disregard any papers or documents submitted by plaintiffs unless the court's copy shows that a copy has gone to each defendants

or to defendants' attorney;

Entered this 8th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB  
District Judge