IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CEASAR R. BANKS,

ORDER

Petitioner,

04-C-737-C

v.

B. McCREEDY, MICHAEL DITTMAN,
JANE GAMBLE and HAYLEY HERMANN,

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Green Bay Correctional Institution in Green Bay, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1). In addition to his complaint, petitioner has filed a motion for a temporary restraining order and preliminary injunction, dkt. #7, and submitted a letter dated November 29, 2004 asking the court to grant him access to the law library at Green Bay Correctional Institution, which I will construe as a second request for

preliminary injunctive relief. Petitioner's request for leave to proceed will be denied because his allegations fail to state a claim for deliberate indifference. Therefore, petitioner's motion for a temporary restraining order and preliminary injunction will be denied as moot and his second request for injunctive relief will be denied as well.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his 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).

Petitioner submitted copies of the paperwork generated in connection with his inmate complaint which are necessary to understand his claims. I will consider these submissions

as part of his pleading. Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002). From these materials, I understand petitioner to be alleging the following.

ALLEGATIONS OF FACT

Petitioner was confined at the Kettle Moraine Correctional Institution at the time of the relevant events in this case. Respondent McCreedy is the unit manager of the health services unit at Kettle Moraine. Respondent Dittman is Kettle Moraine's security director and respondent Gamble is the warden. Respondent Hermann is the inmate complaint examiner at Kettle Moraine.

On or about May 29, 2004, petitioner was in the segregation unit at Kettle Moraine. While working out with his cell mate, petitioner experienced a sharp snapping pain rip through his left shoulder. Believing he had dislocated his shoulder, petitioner pressed a medical call button. After relaying what had happened to a sergeant, petitioner was taken to the Valley View Medical Center in Plymouth, Wisconsin. The doctor who examined petitioner told him that an x-ray would not disclose the nature of his injury and recommended that petitioner see a specialist in Madison, Wisconsin, within a week.

The next day, May 30, 2004, petitioner experienced the same sharp pain in his shoulder when he rolled over in his sleep. Petitioner was taken to Valley View again; this time, his shoulder was x-rayed and a different physician recommended that petitioner see

a specialist in Madison within seven days. Some time later, when petitioner was back in segregation at Kettle Moraine, he saw respondent McCreedy. Petitioner told respondent McCreedy that he was in constant pain and asked why he had not been to see a specialist. Respondent McCreedy took offense at petitioner's questions and expressed his belief that petitioner was making up his injuries. Respondent McCreedy also told petitioner that McCreedy had been informed by respondents Dittman and Gamble that petitioner would never see a specialist in Madison. Petitioner replied that respondents Dittman and Gamble were not medical personnel and that it was illegal to deny him medical treatment because of rules violations.

Some time later, petitioner encountered respondents Gamble and Dittman outside the health services unit at Kettle Moraine. Petitioner asked respondent Dittman why no doctor at Kettle Moraine had ever examined his shoulder and why he had not been taken to a specialist. Respondent Dittman told petitioner that he would not be helped because he did not follow the rules at Kettle Moraine and that plaintiff had no rights at Kettle Moraine. Respondent Gamble called petitioner a "big jail house lawyer" and told him to get his arm fixed "through the courts."

On July 10, 2004, petitioner filed an inmate complaint regarding the failure of Kettle Moraine personnel to take him to a specialist in Madison. Respondent Hermann, the inmate complaint examiner, recommended dismissal of the complaint two days later. In her

report, respondent Hermann noted that she spoke with respondent McCreedy and detailed the course of treatment for petitioner's shoulder. According to the report, the Valley View physician who examined petitioner's shoulder on May 29 found that petitioner's shoulder had "spontaneously reduced on its own" and the physician who saw petitioner on May 30 found no indication that the shoulder was dislocated. Moreover, the report showed that petitioner was taken to the emergency room on June 11 and June 29 after complaining that his shoulder had dislocated; however, emergency room staff found no indication of a dislocation on either occasion. In addition, petitioner had been instructed to keep his left arm in a sling and had been given pain medication since May 29. Respondent Hermann concluded that petitioner had been treated by Kettle Moraine medical staff and recommended dismissal of his complaint based on the information in his medical history.

DISCUSSION

A. Inmate Complaint Examiner

Before turning to the substance of petitioner's complaint, I will address the potential liability of inmate complaint reviewers and examiners. Petitioner has named as a respondent the inmate complaint examiner who reviewed his complaint. It is well established that liability under § 1983 must be based on a 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). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869.

In order to satisfy the personal involvement requirement, a plaintiff need not show direct participation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2002). However, he must show that the defendant knew about the violation and facilitated it, approved it, condoned it or turned a blind eye for fear of what he or she might see. Morfin v. City of Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). The Court of Appeals for the Seventh Circuit has held that a prison official may be held liable for a constitutional violation if he knew about it and had the ability to intervene but failed to do so. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). However, this rule "is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees." Windle v. City of Marion, Ind., 321 F.3d 658, 663 (7th Cir. 2003). Recently, the court of appeals made it clear that in order to succeed on a failure to intervene theory, a plaintiff must prove that the defendant failed to intervene with deliberate or reckless disregard for the plaintiff's constitutional right. Fillmore, 358 F.3d at 505-06. If inmate complaint examiners have authority to find in favor of an inmate on the ground that they believe a regulation or practice is unconstitutional, this might be sufficient to

satisfy the personal involvement requirement. However, if they have such discretion, then they are entitled to absolute immunity for their decisions. It is well settled that prison officials are entitled to immunity for acts that are functionally equivalent to those of judges. Wilson v. Kelkhoff, 86 F.3d 1438, 1443-1445 (7th Cir. 1996).

Absolute immunity immunizes government officials from liability completely and is accorded to public officials only in limited circumstances. Burns v. Reed, 500 U.S. 478, 486-87 (1991). In most instances, qualified immunity is regarded as sufficient to protect government officials in the exercise of their duties. Buckley v. Fitzsimmons, 509 U.S. 259 (1993). Qualified immunity protects officials from liability for the performance of discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). "Truly judicial acts" are among the few functions accorded the more encompassing protections of absolute immunity. Forrester v. White, 484 U.S. 219, 226-27 (1988).

In determining whether government officials are entitled to absolute immunity, courts apply a functional approach, evaluating whether the official's action is functionally comparable to that of judges. Wilson, 86 F.3d at 1445. If the acts are ministerial and unrelated to the decision making process, they are not covered. Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993) (court reporter not entitled to absolute immunity for

failing to provide a transcript promptly even though task is "part of the judicial function"). In deciding whether a government official is entitled to absolute immunity, a court must look at "'the nature of the function performed, not the identity of the actor who performed it.'" Buckley, 509 U.S. at 269 (quoting Forrester, 484 U.S. at 229).

Under the inmate complaint review system described in Wis. Admin. Code Ch. DOC 310, an inmate complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority that they be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). If the examiner makes a recommendation, the reviewing authority has the authority to dismiss, affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. If an inmate appeals the decision of the reviewing authority, the corrections complaint examiner is required to conduct additional investigation where appropriate and make a recommendation to the secretary of the Wisconsin Department of Corrections . Wis. Admin. Code § DOC 310.13. Within forty-five days after a recommendation has been made, the secretary must accept it in whole or with modifications, reject it and make a new decision or return it for further investigation.

"[T]he 'touchstone' for [the applicability of the doctrine of judicial immunity] has been 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'" Snyder v. Nolen, 380 F.3d 279, 286 (7th Cir. 2004) (quoting

Antonie, 508 U.S. at 435-36 (additional citations omitted)). When inmate complaint review personnel reject inmate complaints for procedural deficiencies or dismiss them as unmeritorious, they perform an adjudicatory function and therefore, are entitled to absolute immunity for those acts. Cf. Imbler v. Patchman, 424 U.S. 409, 430 (1976) (absolute immunity available for conduct of prosecutors that is "intimately associated with the judicial phase of the criminal process"); Walrath v. United States, 35 F.3d 277 (7th Cir. 1994) (parole board members are entitled to absolute immunity for making parole revocation decisions); Tobin for Governor v. Illinois State Board of Elections, 268 F.3d 517 (7th Cir. 2001) (members of state board of elections entitled to absolute immunity for refusing to certify political candidates; decision was product of process much like court trial). Also, absolute immunity is accorded officials when they make recommendations to dismiss or to affirm dismissals. Tobin, 268 F.3d at 522 (officials making recommendation entitled to immunity just as magistrate judge who makes recommendation to district court would be); Wilson, 86 F.3d at 1445 (absolute immunity protects against both actual decision making and any act that is "part and parcel" of the decision making process).

Because I conclude that the persons making recommendations for the disposition of inmate complaints are entitled to absolute immunity, petitioner will not be allowed to proceed against respondent Hermann. This conclusion is consistent with the purpose behind affording absolute immunity, which is to free the judicial process from harassment and

intimidation. Forrester, 484 U.S. at 226 ("the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have"). The potential for harassment or intimidation is particularly high in the prison setting given the unusually litigious tendencies of inmate populations.

Although the Wisconsin Administrative Code empowers inmate complaint examiners with authority to conduct investigations, petitioner does not complain about the execution of any such investigation. Therefore, I will reserve for another day the question whether inmate complaint review personnel are entitled to absolute immunity for conducting investigations.

B. Deliberate Indifference to Medical Need

The Supreme Court held in Estelle v. Gamble, 429 U.S. 97, 104-05 (1976), that deliberate indifference to prisoners' serious medial needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. To state a claim under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. In other words, petitioner must allege facts from which it can be inferred that he had a serious medical need and that prison officials were deliberately indifferent to this need. See Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

1. Serious medical need

Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. See id. at 1371. In this case, petitioner alleges that he experienced a sharp pain in his left shoulder two days in a row and that each day he was taken to a clinic outside the prison for medical attention. On each occasion, a doctor recommended that petitioner see a specialist. Nevertheless, respondents McCreedy, Dittman and Gamble refused to allow petitioner to see a specialist. However, respondent Hermann's report indicates that petitioner was given medicine for his pain beginning on May 29. At this early stage of the litigation, I will assume that the pain resulting from repeated dislocations of petitioner's shoulder was sufficient to constitute a serious medical need.

2. Deliberate indifference

The deliberate indifference component of an Eighth Amendment claim requires that prison officials act with a sufficiently culpable state of mind. See id. at 1369. A negligent or inadvertent failure to provide adequate medical care is insufficient because such a failure is not an "unnecessary and wanton infliction of pain" and is not "repugnant to the conscience

of mankind." Estelle, 429 U.S. at 105-06. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Id. at 106. However, the standard for deliberate indifference is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. Halley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). "[A] prisoner claiming deliberate indifference need not prove that the prison officials intended, hoped for, or desired the harm that transpired." Id. It is enough to show that the defendants actually knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk. See id. "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Farmer v. Brennan, 511 U.S. 825, 842 (1994). In this case, petitioner alleges that respondent McCreedy told petitioner he thought petitioner was faking his injuries and that respondents Dittman and Gamble told petitioner he had no rights while at Kettle Moraine and suggested he seek relief for his injuries in court. However, respondent Hermann's report shows that petitioner was taken to the emergency room on four occasions between May 29 and June 29, 2004. He was given pain medication beginning on May 29 and a sling for his shoulder. In light of these facts, petitioner has not made a showing sufficient to support an inference that respondents McCreedy, Dittman and Gamble were deliberately indifferent to his serious medical need. Although their comments to petitioner were insensitive, the facts indicate that petitioner was given prompt medical attention each time he complained of pain

in his shoulder. Distilled, petitioner's allegation of deliberate indifference rests on the fact that he was not taken promptly to a specialist despite the recommendations of two Valley View doctors. At most, this amounts to negligence which is an insufficient basis for liability under § 1983. Cf. Hirsch v. Burke, 40 F.3d 900, 905 (7th Cir. 1994) (failure of police officers to follow examining physician's recommendations, provide diabetic meals and monitor blood sugar level of diabetic detainee insufficient to support § 1983 liability).

C. Motion for Temporary Restraining Order and Preliminary Injunction

In his motion, petitioner seeks an order from this court compelling officials at Green Bay Correctional Institution to provide petitioner the medical care necessary to restore his left shoulder to "a working state." Because I am denying petitioner's request for leave to proceed on his Eighth Amendment claim, his motion for a temporary restraining order and preliminary injunction will be denied as moot.

D. December 2, 2004 Letter

In his letter, petitioner asks the court to grant him access to the law library at Green Bay Correctional Institution. Petitioner states that he wishes to file an amended complaint adding more defendants and that he is being denied access to the law library. This request for injunctive relief is mooted by the dismissal of this case. If, in the future, petitioner

believes that the denial of law library access deprives him of his right of access to the courts, he is free to file a new lawsuit alleging this claim. At this time, plaintiff's request will be denied.

ORDER

IT IS ORDERED that:

1. Petitioner Ceasar R. Banks' request for leave to proceed in forma pauperis is DENIED with respect to his claim that respondents B. McCreedy, Michael Dittman, Jane Gamble and Hayley Hermann were deliberately indifferent to petitioner's serious medical need in violation of the Eighth Amendment. This case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted.

2. Petitioner's motion for a temporary restraining order and preliminary injunction, dkt. #7, is DENIED as moot.

3. Petitioner's request for an order allowing him access to the law library at Green Bay Correctional Institution is DENIED.

4. The unpaid balance of petitioner's filing fee is $144.25; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

5. A strike will be recorded against petitioner pursuant to § 1915(g); and

6. The clerk of court is directed to close the file.

Entered this 9th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge