

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

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FREDERICK ROGERS,

Petitioner,

v.

C.O. HERWIG and  
MATTHEW FRANK,

Respondents.  
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ORDER

04-C-977-C

This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner Frederick Rogers, who is presently confined at the Fox Lake Correctional Institution in Fox Lake, 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 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner Frederick Rogers is an inmate at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. At the time of the incident giving rise to this lawsuit, petitioner was incarcerated at the Racine Correctional Institution in Racine, Wisconsin. Respondent Herwig is a corrections officer at the Racine facility and respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Shortly after 7:00 p.m. on April 27, 2003, petitioner pressed the emergency button in his cell. When respondent Herwig arrived in response, petitioner indicated that he could not breathe. Other inmates told respondent Herwig that petitioner could not breathe also but respondent Herwig tried to kill petitioner by not bringing him an inhaler. Petitioner spent the next three hours lying on the floor in pain and gasping for air. At some point, petitioner lost consciousness and when he woke, his chest and lungs felt like they were on fire. Petitioner notified third shift Staff Officer Roberts of his condition. Roberts then told Sergeant Evans and Lieutenant Aldana that the second shift corrections officers had left without giving petitioner his inhaler. Evans and Aldana brought petitioner his inhaler.

## DISCUSSION

### A. Respondent Frank

In order for a supervisory official to be found liable under § 1983, there must be a “causal connection, or an affirmative link, between the misconduct complained of and the official sued.” Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Petitioner has not alleged any facts suggesting that respondent Frank was personally involved in the incident underlying petitioner’s claim. Although respondent Frank is Secretary of the Wisconsin Department of Corrections, the doctrine of respondeat superior, under which a superior may be liable for a subordinate’s

tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Accordingly, respondent Frank will be dismissed.

#### B. Eighth Amendment

The Eighth Amendment requires the government “to provide medical care for those whom it is punishing by incarceration.” Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). This does not mean that prisoners are entitled to whatever medical treatment they desire. Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care only when they are deliberately indifferent to a prisoner’s serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). The Court of Appeals for the Seventh Circuit has held that serious medical needs 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. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Petitioner’s allegation that he spent three hours lying on the floor in pain, gasping for air meets this standard. In addition, the court has recognized that a “‘serious’ medical need is one that has been diagnosed by a physician as mandating treatment.” Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997). It can be inferred from petitioner’s allegation that he had been prescribed an inhaler for his asthma. Thus,

petitioner's allegations satisfy this first prong.

To show deliberate indifference, petitioner must establish that a respondent was "subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). Petitioner alleges that respondent Herwig withheld his inhaler for three hours while petitioner gasped for air on the floor and eventually passed out. This allegation satisfies an assertion of "deliberate indifference." Because petitioner's allegations satisfy both prongs of the test, I will grant petitioner leave to proceed against respondent Herwig on his Eighth Amendment claim.

### C. Motion for Appointment of Counsel

Petitioner asks that counsel be appointed to represent him in this case. Before the court can appoint counsel in a civil action such as this, it must find first that the petitioner made a reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Petitioner must submit a list of the names and addresses of at least three lawyers who declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Petitioner does not suggest that he has made an effort to find a lawyer on his own and that his efforts have failed.

Second, the court must consider whether the petitioner is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is too new to allow me to assess petitioner's abilities. Therefore, petitioner's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

#### ORDER

IT IS ORDERED that

1. Petitioner Frederick Roger's request for leave to proceed in forma pauperis is GRANTED on his Eighth Amendment claim that respondent Herwig was deliberately indifferent to his serious medical needs when he denied petitioner an inhaler for his asthma on April 27, 2003.
2. Respondent Matthew Frank is DISMISSED for lack of personal involvement.
3. Petitioner's motion for appointment of counsel is DENIED without prejudice to his renewing it at some later stage of the proceedings.
4. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The

court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. The unpaid balance of petitioner's filing fee is \$148.02; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

7. Pursuant to an informal service agreement between the Attorney General and this court, a copy of petitioner's complaint and this order are being sent today to the Attorney General for service on the defendant.

8. Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. Those papers are not considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event respondent wishes to examine them.

Entered this 14th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge