IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RAIMUNDO A. JONES,

ORDER

Petitioner,

05-C-287-C

v.

SUE WARD, STEVE HELGERSON,
ANN SERMROM, WILLIAM NOLAND,
CYNTHIA THORPE, RICK RAEMISH,
and SANDRA HAUTUMAKI,

Respondent.

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This is a proposed civil action for monetary and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Columbia Correctional Institution in Portage, 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. 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 Raimundo A. Jones is a Wisconsin state inmate incarcerated at the Columbia Correctional Institution in Portage, Wisconsin. At the Columbia facility, respondents Sue Ward and Steve Helgerson are nurses, respondent Ann Sermrom is a health services unit manager, respondent William Noland is an inmate complaint investigator, respondent Cynthia Thorpe is a regional nursing coordinator, respondent Sandra Hautumaki

is a corrections complaint examiner and respondent Rick Raemisch is Deputy Secretary of the Department of Corrections.

On April 6, 2005, petitioner was playing basketball during his recreation period until he suffered a foot injury. Petitioner was escorted to the prison health services unit where he was examined by respondent Ward. Respondent Ward touched petitioner's leg to check for major injury and filled out a special needs form on which she indicated that petitioner was to be given an extra pillow to elevate his foot, a cold bag to ice his injury four times daily and an ace bandage to wrap it. (The documents petitioner attached to his complaint indicate that respondent Ward offered petitioner analgesics but that he refused them.) Respondent Ward did not inform petitioner that he would be scheduled for an x-ray examination. Petitioner was not seen by a doctor.

After returning to his housing unit, petitioner complained to a sergeant on his housing unit about his continuing pain. Petitioner was seen again at the health services unit on Monday, April 11. The nurse who examined petitioner placed him on a recreation restriction for one week, extended the period he was to be given an extra pillow and an ace bandage for one week and added that he was to be given crutches during that time. The following Monday, April 18, petitioner filled out a health services request indicating that he was still in pain. Someone from the health services unit replied, informing petitioner that he would be placed on the list to have an x-ray examination. Petitioner's foot was x-rayed

on April 21, 2005. The physician reviewing the results concluded that petitioner had a fractured bone in his foot. Petitioner was given a boot splint for the fracture.

Sometime shortly thereafter, petitioner filed an inmate complaint, alleging inadequate medical care. As part of his investigation of petitioner's claims, respondent Nolan contacted respondent Sermrom, who confirmed that petitioner had injured his right foot during his recreation period and that petitioner was not initially given crutches or an x-ray examination. Respondent Nolan recommended denial of petitioner's complaint, noting that the bureau of health services had reviewed the matter and concluded that petitioner had received appropriate medical care. Petitioner appealed the dismissal. In his appeal, petitioner indicated that the x-ray had revealed that his foot was broken. Respondent Hautumaki recommended that petitioner's appeal be dismissed. Respondent Raemisch adopted that recommendation and dismissed petitioner's appeal.

DISCUSSION

A. Appropriate Respondents

It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. 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). In order to satisfy the personal involvement requirement, a petitioner 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). None of petitioner's allegations indicate that respondents Helgerson, Sermrom and Thorpe were personally involved with the treatment petitioner received for his injured foot. There are no allegations whatsoever relating to respondent Helgerson. The only allegation regarding respondent Sermrom is that she provided certain information to respondent Noland during his investigation of petitioner's complaint. As for respondent Thorpe, petitioner contends that she was negligent in supervising the other nurses in the health services unit. The doctrine of respondeat superior, which allows a supervisor to be held responsible for the acts of his subordinates, does not apply to claims brought under § 1983. Gentry, 65 F.3d at 561; Del Raine, 32 F.3d at 1047; Wolf-Lillie, 699 F.2d at 869.

As for respondents Noland, Raemisch and Hautumaki, petitioner has alleged only that each dismissed or recommended dismissal of his inmate complaint relating to the medical treatment he received. 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 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 respondents Noland, Raemisch and Hautumaki. 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. Having thus concluded that petitioner may not pursue his claim against respondents Helgerson, Sermrom, Noland, Thorpe, Raemisch or Hautumaki, I turn to the question whether petitioner has stated a constitutional claim against respondent Ward, the sole remaining respondent.

B. Eighth Amendment

I understand petitioner to allege that respondent Ward's failure to x-ray petitioner's

foot the first time he visited the health services unit violated petitioner's Eighth Amendment right not to be subjected to cruel and unusual punishment. 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) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). However, prisoners are not entitled to whatever medical treatment they desire. To state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Therefore, petitioner must allege facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). Id. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

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, 111 F.3d at 1371. The Supreme Court has held that deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Whether or not the fracture petitioner suffered would cause serious and

permanent impairment if left untreated, the deliberate withholding of medical care would likely result in needless pain and suffering. Thus, I will assume that petitioner's complaint adequately alleges that he had a serious medical need.

However, petitioner's allegations do not even come close to suggesting that respondent Ward acted with the kind of indifference to that injury necessary to make out a claim under the Eighth Amendment. "'[T]he Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but only to that narrow class of deprivations involving serious injury inflicted by prison officials acting with a culpable state of mind.'" Snipes, 95 F.3d at 590 (quoting Hudson v. McMillian, 503 U.S. 1, 19 (1992) (Thomas, J., dissenting)). Inmates are not entitled to "the most intelligent, progressive, humane, or efficacious" treatment available or even to protection against negligent action that would amount to medical malpractice if it occurred in the private sector. Anderson v. Romero, 72 F.3d 518, 524 (7th Cir. 1995); see also Vance v. Peters, 97 F. 3d 987, 992 (7th Cir. 1996); Oliver v. Deen, 77 F.3d 156, 161 (7th Cir. 1996). "Medical decisions that may be characterized as 'classic examples of matters for medical judgment," such as whether one course of treatment is preferable to another, are beyond the [Eighth] Amendment's purview." Snipes, 95 F.3d at 591 (quoting Estelle, 429 U.S. at 107). 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). Deliberate indifference means more than inadvertent error, negligence or even gross negligence. Vance, 97 F.3d at 992.

Petitioner was given ice bags, pillows, bandages, crutches and a split. He was seen by medical professionals three times in approximately two weeks, given an x-ray examination, placed on recreation restriction and offered analgesics. All of petitioner's complaints and requests were addressed and he was given increased levels of treatment as his injury persisted. The notion that anyone has been deliberately indifferent to his fracture is preposterous. The jist of petitioner's grievance seems to be that respondent Ward did not place him on the list to have an x-ray examination immediately. But petitioner alleges that respondent Ward examined petitioner's leg by touching it and determined that his injury was not so severe as to merit more than an ace bandage, icing and elevation. This assessment may have proved to be in error but nothing in petitioner's complaint suggests that it was negligent, much less sufficiently culpable to establish an Eighth Amendment violation. Systematically x-raying every injury would undoubtedly be a waste of scarce resources. Because petitioner's allegations do not suggest that respondent Ward acted with deliberate indifference to his foot injury, he will not be allowed to proceed on his claim.

ORDER

IT IS ORDERED that:

1. Petitioner Raimundo Jones' request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is $205.84; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

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

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

Entered this 1st day of August, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge