IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRANDEN SUSTMAN,

Petitioner,

v.

STATE OF WISCONSIN,
STEVE WATTERS, Director (Sand Ridge Secure Treatment Center)
STEVE SCHNEIDER, Security Director (S.R.S.T.C.)
DAVID THORNTON, Treatment Director (S.R.S.T.C.)
TIM THOMAS, Unit Manager (S.R.S.T.C.)

Respondents.

OPINION AND ORDER

06-C-0293-C

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Branden Sustman is presently detained as a patient at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin. Petitioner contends that respondents (1) violated his constitutional rights by subjecting him to cruel and unusual punishment; (2) engaged in a conspiracy to violate his civil rights; (3) violated his rights under several federal statutes; and (4) violated his rights under several state laws. He seeks leave to proceed without prepayment of fees and costs or providing security for

such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Because he is a patient and not a prisoner, petitioner is not subject to the 1996 Prison Litigation Reform Act.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, pursuant to 28 U.S.C. § 1915(e)(2), if a litigant is requesting leave to proceed in forma pauperis, the court must deny leave to proceed if the action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a defendant who is immune from such relief.

In his complaint and attachments, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Branden Sustman is a patient at Sand Ridge Secure Treatment Center in Mauston, Wisconsin, confined pursuant to Wisconsin's Sexually Violent Persons Law, Wis. Stat. ch. 980. Respondents are employed at Sand Ridge: Steve Watters is the director; Steve Schneider is the security director; David Thornton is the treatment director; and Tim Thomas is a unit manager.

On March 22, 2006, respondents questioned petitioner regarding charges brought against another patient. Respondents wanted to know whether petitioner had seen the other

patient engage in inappropriate sexual behavior; petitioner stated that he had not seen this. Respondents tried to force petitioner to make false statements regarding the other patient and to sign a statement against the other patient, accusing him of rape. Respondents called petitioner a liar and told him he would be punished if he did not sign the statement. They also told him that the other patient would not hurt him if he signed the statement. Petitioner refused the sign the statement and was punished by being deprived of access to his job, school, church services and the game room. Respondents also began threatening petitioner by telling him that the other patient was going to kill him when he sees him if petitioner did not sign this statement against him.

OPINION

As an initial matter, I note that petitioner appears to have modeled his complaint after that of Kenneth Parrish, who recently filed an almost identical complaint in this court. Petitioner may have fared better if he had provided a clear and concise statement of the facts of his case in his own words. Instead, petitioner's complaint consists almost entirely of confusing and often nonsensical lists of federal and state laws that were allegedly violated, and in most instances it does not provide facts to support the allegations.

A. Federal Constitutional Violations

Although it is far from clear, it appears that petitioner is alleging that his constitutional right to be free from cruel and unusual punishment was violated when respondents punished him for not signing a statement against another patient by depriving petitioner of access to his job, school, church services and the game room and by telling him that another patient was going to kill him if he did not sign the statement.

As an initial matter, I note that the Eleventh Amendment denies federal courts the authority to entertain suits brought by private parties against a state without its consent. Quern v. Jordan, 440 U.S. 332, 337 (1979). Therefore, petitioner will be denied leave to proceed against respondent State of Wisconsin.

Unlike criminally confined offenders, who may be subjected to punishment as long as such punishment is not cruel and unusual under the Eighth Amendment, persons civilly confined (including those confined under Chapter 980) may not be punished. Youngberg v. Romeo, 457 U.S. 307, 320 (1982). Punishment of civilly confined patients violates their substantive due process rights under the Fourteenth Amendment. Id. However, ch. 980 patients "may be subjected to conditions that advance goals such as preventing escape and assuring the safety of others." Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003). The question is whether the actions petitioner complains of are punitive.

Youngberg holds that in examining whether conditions of civil confinement are

punitive, "courts must show deference to the judgment exercised by the qualified professional." Id. at 321. Professional decision makers include persons "competent, whether by education, training, or experience, to make the particular decision at issue." Id. at 323 n.30. Day-to-day decisions that create the conditions of civil confinement may be made by employees without formal training, provided the employees are subject to the supervision of qualified persons. Id. Decisions made by such professionals are "presumptively valid." Id. at 323; see also Barichello v. McDonald, 98 F.3d 948 (7th Cir. 1996); Estate of Cole v. Fromm, 94 F.3d 254 (7th Cir. 1996) (applying same standard to pretrial detainee committed to psychiatric ward). Liability arises only when the decision by the professional is such a departure from accepted professional judgment, practice or standards that it demonstrates that the person responsible did not base the decision on such judgment. Youngberg, 457 U.S. at 320. Thus, for petitioner to overcome the presumptive validity of respondents' alleged decisions to deny him access to his job, school, church services and the game room and state a claim that his constitutional rights have been violated by the conditions of his civil confinement, petitioner must allege facts that indicate that respondents are not basing their actions on professional judgment. The Court of Appeals for the Seventh Circuit has stated that "professional judgment, like recklessness and gross negligence, generally falls somewhere between simple negligence and intentional misconduct." Porter v. Illinois, 36 F.3d 684, 688 (7th Cir. 1994) (quoting Shaw by Strain

v. Stackhouse, 920 F.2d 1135 (3d Cir. 1990)). (I assume that in Porter, the court meant to define *lack* of professional judgment in those terms.) Thus, to make out an arguable basis for his claim, petitioner must allege facts that indicate that respondents are acting more than negligently, but he need not show intentional misconduct.

Not all restraints or restrictions imposed by officials at civil institutions automatically constitute "punishment" in the constitutional sense. In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court examined the due process protections applicable to pretrial detainees, a group that, like the involuntarily committed, may not be subjected to punitive conditions of confinement. The Court stated that "[n]ot every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention." Id. at 537. In determining whether a condition or restriction is punitive, the critical question is "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." Id. at 538. The Court cited effective management of a detention facility and maintenance of security and order as legitimate interests that could justify conditions and restrictions beyond those necessary to assure a detainee's presence at trial. Id. at 540. Bell's reasoning applies with equal force in the context of a treatment facility like the Sand Ridge Secure Treatment Center. Although

involuntarily committed individuals may not be subjected to punitive conditions of confinement, the state's interests in order, security, and effective management apply just as strongly in the civil institution setting. "In operating an institution . . . there are occasions in which it is necessary for the State to restrain the movement of residents - for example, to protect them as well as others from violence." Youngberg, 457 U.S. at 320; see also Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003) (ch. 980 patients "may be subjected to conditions that advance goals such as preventing escape and assuring the safety of others."). Thus, the due process clause does not prevent officials at civil institutions like the Sand Ridge Secure Treatment Center from imposing rules to maintain security and order and from imposing minor sanctions for violations of those rules. Bell, 441 U.S. at 537 ("This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may."); Allison, 332 F.3d at 1079.

I conclude that at this stage in the proceedings, petitioner has alleged sufficient facts to establish a claim that respondents violated his substantive due process rights under the Fourteenth Amendment when they withdrew his privileges of work, school, church and recreation. I will grant petitioner leave to proceed on this claim. If petitioner can prove that respondents withdrew his privileges of work, school, church and recreation in order to punish him for refusing to sign a statement against another patient, he may be able to show that his

constitutional rights were violated. Petitioner should bear in mind that to prevail on his claim he will have to adduce facts to prove that respondents departed significantly from accepted professional judgment and acted in order to punish petitioner rather than to maintain order and safety in the institution when they took the actions petitioner alleges they took.

Moreover, petitioner will have to prove that each respondent participated personally in the alleged wrongdoings. Petitioner alleged, generally, that *respondents* engaged in the actions described. The Court of Appeals for the Seventh Circuit has held that to recover damages under 42 U.S.C. § 1983, a petitioner must establish each respondent's personal responsibility for the claimed deprivation of a constitutional right. A respondent may be liable when he directly participates in the deprivation, although direct participation is not required. An official satisfies the personal responsibility requirement "if she acts or fails to act with a deliberate or reckless disregard of petitioner's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). 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, 761 F.2d at 369; Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). 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). Therefore, to prevail against each respondent, petitioner will have to show that each was directly or indirectly involved in causing the alleged constitutional deprivation.

I will not grant petitioner leave to proceed on his claim that respondents violated his constitutional rights when they threatened that another patient was going to kill petitioner if he did not sign a statement because allegations of verbal threats do not establish a constitutional claim. Patton v. Przybylski, 822 F.2d 697, 700 (7th Cir.1987) (derogatory remarks do not constitute a constitutional violation); McDowell v. Jones, 990 F.2d 433, 434 (8th Cir.1993) (verbal threats and name calling directed at inmate not actionable under § 1983); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (prison official's use of vulgar language did not violate inmate's civil rights); Martin v. Sargent, 780 F.2d 1334, 1338 (8th Cir. 1985) (verbal threats by correctional officer do not amount to constitutional violation).

B. Conspiracy

Petitioner contends that there was a "conspiracy to interfere with Civil Rights under 42 USC 1985." Cpt. ¶ 9. He does not specify what the alleged conspiracy entailed or which provisions of § 1985 were violated. The only portions of § 1985 that petitioner could

conceivably invoke are the second clause of § 1985(2) or § 1985(3), which cover general equal protection violations. Section 1985(1) applies to violations of rights of United States employees and the first clause of § 1985(2) applies to violations of rights during court proceedings. The second clause of § 1985(2) and § 1985(3) both require proof of a racial or otherwise class-based discriminatory animus behind the defendants' actions. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993); Griffin v. Breckenridge, 403 U.S. 88 (1971), Williams v. St. Joseph Hospital, 629 F. 2d 448, 451 (7th Cir. 1980). Petitioner did not allege any facts regarding his race or class membership or facts suggesting that actions were taken against him because of his race or class. Therefore, I will deny petitioner leave to proceed on his § 1985 claim.

C. Federal Statutes

In his complaint (paragraph 8), petitioner alleges that his rights under the "Patient and Civil Rights Protection," and the "Rehabilitation Act" were violated. I am not aware of a law called "Patient and Civil Rights Protection." Petitioner cites 42 U.S.C. § 1331, which is the repealed Reconversion Unemployment Benefits for Seamen Act.

Petitioner does not allege how his rights under these statutes were violated and I can discern no violation. Although petitioner is not expected to provide elaborate legal arguments in the complaint, he cannot merely name a number of statutes and expect the

court to peruse the entire text of each statute to determine whether any of its clauses were potentially violated. Petitioner will be denied leave to proceed on his claim that his federal statutory rights were violated.

D. State Law Claims

Petitioner contends that respondents engaged in intentional infliction of emotional harm. This is a state law claim. Generally, a federal court has jurisdiction to hear a case in three instances: (1) when the complaint raises a federal question, 28 U.S.C. § 1331; (2) when the parties are citizens of different states and the amount in controversy is greater than $75,000, 28 U.S.C. § 1332; and (3) when a state law claim is part of the same case or controversy as a federal law claim that may be considered under § 1331, 28 U.S.C. § 1367. Because neither (1) or (2) is applicable, the only way this court could entertain petitioner's claim of intentional infliction of emotional harm would be by exercising supplemental jurisdiction. The existence of supplemental jurisdiction is predicated on the existence of a substantial federal claim and a common nucleus of operative fact as to state and federal claims such that the claims would ordinarily be tried in one proceeding. Mine Workers v. Gibbs, 383 U.S. 715 (1966). However, even if I concluded that there is a "common nucleus of operative fact" between petitioner's federal claim that his constitutional rights were violated and his state law claim of intentional infliction of emotional harm, I would have

to deny him leave to proceed on the state law claim because he has not alleged facts to establish a claim of intentional infliction of emotional distress.

In Wisconsin, the elements of a claim for intentional infliction of emotional distress are: (1) respondent's conduct was intentional; (2) respondent's conduct was extreme and outrageous; (3) respondent's conduct was a cause-in-fact of petitioner's injury; and (4) petitioner suffered an extreme and disabling emotional response to respondent's conduct. Alsteen v. Gehl, 21 Wis. 2d 349, 359-60, 124 N.W.2d 312, 318 (1963). Petitioner has not alleged any facts suggesting that he suffered an extreme and disabling emotional response to respondent's conduct. Petitioner will be denied leave to proceed on his claim that respondents engaged in intentional infliction of emotional distress.

ORDER

IT IS ORDERED that

1. Petitioner Branden Sustman's request for leave to proceed in forma pauperis is GRANTED as to his claim that respondents punished him in violation of his substantive due process rights and is DENIED as to his claims that respondents conspired against him, violated his federal statutory rights, violated his rights under state law and violated his constitutional rights by threatening him.

2. Respondent State of Wisconsin is dismissed from this case.

3. Petitioner Branden Sustman should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. Petitioner should retain 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. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' attorney.

4. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on the state respondents.

Entered this 12th day of June, 2006.

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