IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CLAYTON HARDY MELLENDER,

Petitioner, ORDER

v. 06-C-298-C

DANE COUNTY; PRISON HEALTH SERVICES at Dane County Jail; SHERIFF GARY HAMBLIN; CAPTAIN MIKE PLUMER; and DR. JOHN DOE,

Respondents.

- -

In this proposed civil action for monetary relief, petitioner Clayton Hardy Mellender, a prisoner at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, contends that respondents violated his rights under the Eighth Amendment by refusing to dispense his prescription pain medication while he was being held at the jail awaiting a hearing. Petitioner requests leave to proceed in forma pauperis, as authorized by 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. He has made the initial partial payment required under § 1915(b)(1).

Because petitioner has alleged facts from which it can be inferred that respondent Doe

exhibited deliberate indifference to his serious medical needs by discontinuing his prescription methadone prescription or that respondent Dane County exhibited deliberate indifference to his serious medical needs by enforcing a policy that restricted inmates from receiving prescription methadone, his request for leave to proceed against these respondents will be granted. However, because Prison Health Services is not a alleged to have promulgated a policy denying methadone to inmates and because respondents Sheriff Gary Hamblin and Captain Mike Plumer had no personal involvement in the decision to deprive petitioner of his medication, these respondents will be dismissed from the lawsuit.

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, when the litigant is a prisoner, the court must dismiss the complaint if the claims contained in it, even when read broadly, are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

I draw the following facts from petitioner's complaint and the documents attached to it.

ALLEGATIONS OF FACT

A. Parties

Petitioner Clayton Mellender is a prisoner confined presently at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. At all times relevant to this lawsuit, petitioner was confined at the Dane County jail.

Respondent Dane County is responsible for the operation of the Dane County jail.

Respondent Prison Health Services is the agency contracted by respondent Dane County to provide health services to inmates of the Dane County jail.

Respondent Sheriff Gary Hamblin is the final policymaker for the Dane County jail.

Respondent Captain Mike Plumer is a jail administrator.

Respondent Dr. John Doe is the doctor who discontinued petitioner's methadone prescription.

B. Denial of Methadone

On March 28, 2006, petitioner was brought from the New Lisbon Correctional Institution to the Dane County jail to await a court appearance in Dane County court on March 29, 2006. When he arrived at the jail, petitioner met with a nurse employed by respondent Prison Health Services, who informed him that because he had a prescription for methadone, a narcotic painkiller, he would have to be placed in a segregation cell. During a prior period of confinement at the jail in March 2005, petitioner had been held in segregation for the same reason. Petitioner did not object to the policy or to his placement

in segregation.

During the booking process, petitioner showed the jail nurse a copy of a medical report dated March 16, 2005, from his physician, Dr. Nathan Rudin. In the report, Dr. Rudin described petitioner's medical problems and indicated that petitioner should receive methadone three times daily. Petitioner encouraged the nurse to make a copy of the report for his medical chart. She skimmed the beginning of the report, but did not copy it.

On the evening of March 28, 2006 and the morning of March 29, petitioner received his normal dose of medication. When he was not provided with medication at noon on March 29, he requested it and was told that respondent Dr. John Doe had "discontinued" the medication pursuant to a jail policy prohibiting prisoners from receiving narcotic medications while incarcerated. Petitioner was not examined by any doctor or nurse before the decision was made to discontinue his prescription.

Petitioner did not receive any pain medication for the remainder of his stay at the jail, which ended on March 31, 2006.

OPINION

A. Proper Respondents to Claim Under 42 U.S.C. § 1983

Petitioner has named five respondents to his lawsuit: Prison Health Services, Dr. Doe, Captain Mike Plumer, Sheriff Gary Hamblin and Dane County. Liability under § 1983

attaches to persons who "under color of any statute, ordinance, regulation, custom, or usage" of state power deprive a citizen of any right under the Constitution or federal law. In order to qualify as a state actor, a "person" must be clothed with the authority of the state. Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 315 (1913).

A private corporation may be considered a person held liable under § 1983 for its employees' constitutional violations only if an official corporate policy caused the alleged violation. Woodward v. Correctional Med. Services. of Ill., Inc., 368 F.3d 917, 927 (7th Cir. 2004). Petitioner does not allege that respondent Prison Health Services promulgated a policy denying all inmates prescription narcotics; instead, he attributes the allegedly unconstitutional policy to respondents Hamblin and Dane County. Therefore, respondent Prison Health Services is not a proper respondent to this lawsuit and will be dismissed. Although respondent Doe is an employee of respondent Prison Health Services, he was the person who petitioner alleges made the decision to "discontinue" the prescription for methadone (whether by acting in accordance with the alleged policy of Dane County or independently is unclear at this stage of the proceedings). Consequently, Doe may be a proper respondent to this action.

Petitioner has made no allegations whatsoever regarding respondent Plumer. Because it cannot be inferred from petitioner's allegations that respondent Plumer was personally involved in any alleged violation of petitioner's rights, he will be dismissed from the lawsuit.

That leaves respondents Dane County and Hamblin. Local governing bodies, such as respondent Dane County, may be sued under 42 U.S.C. § 1983 only when their allegedly unconstitutional actions were the result of the implementation or execution of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or were undertaken "pursuant to governmental custom, even [though the] custom has not received formal approval through the body's official decision making channels." Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690 (1978). The decisions of a municipality's final decision maker are attributable to the municipality itself. Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986); McGreal v. Ostrov, 368 F.3d 657, 685 (7th Cir. 2004).

In his complaint, petitioner does not indicate whether he is suing respondent Hamblin in his individual capacity, his official capacity, or both. The distinction is important:

> [Individual] capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity.

Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). Because a county may not be held liable under § 1983 on a theory of respondeat superior, Monell, 436 U.S. at 691, if

respondent Hamblin violated county policy by prohibiting jail inmates from receiving prescription narcotics, respondent Dane County could not be held liable for his decision. However, petitioner does not allege that respondent Hamblin discontinued his prescription medication personally or that Hamblin violated county policy by authorizing jail staff to deny inmates narcotic medication. Instead, petitioner alleges that respondent Hamblin is the "final policymaker" for the Dane County jail and that in his official role as policymaker, Hamblin enforced a jail policy prohibiting prisoners from receiving all prescription narcotics. (Apparently, the policy was not enforced on March 28 and on the morning of March 29, since petitioner received his medication at those times.) Any actions taken by respondent Hamblin as the final policymaker for respondent Dane County would constitute official actions attributable to the county itself. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 694 (1978) (local government may be sued under § 1983 if execution of its policies or customs has inflicted constitutional injury). Therefore, petitioner's suit against respondent Hamblin is not a suit against him in his personal capacity, but rather a suit against him in his official capacity as the county's final decision maker on matters pertaining to the jail and its inmates.

Because Monell authorizes suits brought against local government units directly, "official capacity" suits against municipal decision makers are redundant when the municipality has been named as another respondent in the lawsuit. See, e.g., Busby v. City

of Orlando, 931 F.2d 764, 766 (11th Cir. 1991) ("Because suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists a need to bring official-capacity actions against local government officials, because local government units can be sued directly."); Union Pacific R. Co. v. Village of South Barrington, 958 F. Supp. 1285, 1291 (N.D. Ill. 1997) ("It is well-settled law that claims against municipal officials in their official capacities are really claims against the municipality and, thus, are redundant when the municipality is also named as a defendant."); Kohn v. Mucia 776 F. Supp. 348, 356 (N.D. Ill. 1991). Therefore, because it is really the county against whom petitioner's claim is directed, respondent Dane County is the proper respondent, not respondent Hamblin. McMillian v. Monroe County, Alabama, 520 U.S. 781, 797 (1997) ("Our precedent instructs that . . . if the sheriff acts as law enforcement policymaker for [the] County, then the county would be answerable under § 1983."). Petitioner will be denied leave to proceed against respondent Hamblin.

B. Eighth Amendment

"[T]he 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)). In order to succeed on a claim of deliberate indifference, a plaintiff must establish facts from which it can be inferred that

he had a serious medical need and that prison officials were deliberately indifferent to that need. Id. at 104; see also 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" are not only conditions that are life threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371.

Petitioner contends that respondents Dr. Doe and Dane County exhibited deliberate indifference to his need for pain medication when Dr. Doe "discontinued" petitioner's validly prescribed methadone pursuant to a jail policy prohibiting inmates from receiving narcotic pain medication. In Gil v. Reed, 381 F.3d 649, 662 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit addressed the question whether a prison official exhibited deliberate indifference by denying an inmate a single dose of a prescription medication. The court held:

> We have noted that it is difficult to generalize about the civilized minimum of public concern necessary for the health of prisoners except to observe that this civilized minimum is a function both of objective need and cost. The lower the cost, the less need has to be shown, but the need must still be shown to be substantial. Here the cost of handing over the prescribed antibiotic was zero. The drug had been prescribed and dispensed into a bottle labeled for [the plaintiff] and was in [the defendant's] hand when he refused to hand it over.

Id. Citing Zentmyer v. Kendall County, Illinois, 220 F.3d 805, 810 (7th Cir. 2000), the court stated that the Eighth Amendment "prohibit[s] jail personnel from intentionally

denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Gil, 381 F.3d at 662.

Petitioner alleges that he had a prescription for three doses of methadone daily and that respondent Doe was aware of his need for the medication. Although he acknowledges receiving two doses of his medication, petitioner alleges that he was given no pain medicine from the morning of March 28 until he left the jail on March 31. Because petitioner's regular doctor had issued a standing prescription for the medication covering the period he would be in custody at the jail, petitioner has alleged facts from which it may be inferred that he had a need for the medicine. At issue is whether respondent Dr. Doe (through his independent actions) or respondent Dane County (through its policy) deprived petitioner of his Eighth Amendment right to be free from cruel and unusual punishment.

Deliberate indifference requires that a prison official "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and actually "draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate indifference in the denial or delay of medical care can be shown by a defendant's actual intent or reckless disregard. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985). Reckless disregard is highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Id.

Assuming the facts petitioner has plead are true, as the court must do at this stage of

the proceedings, several scenarios are possible. Perhaps respondent Doe acted arbitrarily or maliciously when he decided to confiscate petitioner's prescription medication, knowing that it was validly prescribed and that petitioner would suffer unnecessary pain without the medication. If he did so while claiming falsely that he was simply complying with "jail policy," then his actions would violate the Eighth Amendment.

Another possibility is that the Dane County jail adopted an official policy the day after plaintiff arrived at the jail that prohibits inmates from receiving prescription narcotics. Although it would seem strange to say that a governmental unit such as respondent Dane County is capable of exhibiting "deliberate indifference," courts have recognized that municipal policies may subject county defendants to liability under the Eighth Amendment:

> [I]f [a] jail had a policy that directed the sheriff's personnel to throw away all prescription medications brought in by detainees or prisoners without even reading the label and without making alternative provisions for the affected individuals, the County would be liable assuming that such a policy would, on its face, violate the Eighth Amendment (or the Due Process clause, for pre-trial detainees). [Even] one application of the offensive policy resulting in a constitutional violation [would be] sufficient to establish municipal liability.

Calhoun v. Ramsey, 408 F.3d 375, 379-80 (7th Cir. 2005) (citing City of Oklahoma v. Tuttle, 471 U.S. 808, 822 (1985)). That hypothetical situation is not far afield from the one petitioner appears to allege in this lawsuit. If, on its own or through the decision making authority of Sheriff Hamblin, respondent Dane County promulgated and enforced a policy prohibiting inmates from receiving narcotic medication, knowing that the policy would result

in the inmates' unnecessary suffering and without providing inmates with an alternative source of relief, it could be held liable for any consequent injury caused by the policy's enforcement. Because petitioner has alleged facts from which it may be inferred that either respondent Doe or respondent Dane County violated his rights under the Eighth Amendment, he will be granted leave to proceed against them both.

C. Motion for Appointment of Counsel

Petitioner has moved the court to appoint counsel for him because he believes his confinement in segregation will make it difficult for him to litigate his case. The Court of Appeals for the Seventh Circuit has held that before a district court can consider a motion for appointment of counsel made by an indigent plaintiff in a civil action, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, a petitioner s required to submit the names and addresses of at least three lawyers that he asked to represent him and who turned him down. Petitioner does not suggest that he has complied with this preliminary step.

However, even if plaintiff had submitted copies of rejection letters he received from three lawyers, I would deny his request. Federal district courts are authorized by

statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993) (quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). The Court of Appeals for the Seventh Circuit will find such an appointment reasonable where the plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

In support of his motion, petitioner asserts that

> [his] imprisonment as a segregation inmate will greatly limit his ability to litigate this case. This case will likely involve substantial investigation and discovery. The issues in this case are complex. A lawyer would help plaintiff to apply the law properly in briefs and before the court.

Dkt. #3. Petitioner is in no worse position than any other prisoner who files a lawsuit pro se. Although petitioner asserts that he has "only a year of post high school education," he does not allege that he has difficulty reading or writing or understanding court instructions or direction. Dkt. # 4. Moreover, despite his allegations regarding the complexity of his case, the law governing petitioner's claim is clear, was established long ago and is described

in detail above. At the preliminary pretrial conference scheduled to be held on January 4, 2006, petitioner will be instructed in the use of discovery techniques available to him under the Federal Rules of Civil Procedure and informed of procedures he will be expected to follow in moving his case to resolution.

The obstacles plaintiff faces in gathering the evidence he needs to prove his case may be difficult, but the inherent difficulty in proving cases raising claims regarding the legality of prison policies is not sufficient by itself to require appointed counsel. If this were the case, there would be legal precedent mandating the appointment of counsel in such cases. There is no such precedent, nor is there likely to be.

As helpful as it would be to plaintiff and to the court to have the assistance of counsel, I solicit such help only in rare instances in which the plaintiff is unusually handicapped in presenting his case or the issue raised is one of significance. Only a limited number of lawyers are capable of representing indigent plaintiffs in civil cases and willing to do so without any compensation and without reimbursement for expenses. Federal courts and federal plaintiffs are not the only supplicants for help from this limited group.

Approximately 220,000 Wisconsin residents living below 100% of the federal poverty threshold need civil legal services each year. Wisconsin State Bar, available at http://www.wisbar.org/AM/Template.cfm?Section=ProBono (last visited July 7, 2006). Approximately 63,800 of these individuals actually seek access to the legal system. Id.

Wisconsin's three largest civil legal services programs only had the resources to handle approximately 16,000 cases using a combination of staff lawyers, volunteer lawyers, and partially compensated private lawyers. The areas of need are legion.

Wisconsin's lawyers assume the costs of pro bono representation in civil cases raising claims of violations of the Americans with Disability Act (especially employment discrimination, accessibility, specialized transportation, and right to community service) the Fair Housing Act, Medicaid and Medicare regulations, Social Security, Homestead Credit, and Title VII discrimination. They assist persons with claims of deinstitutionalization from mental health facilities; abuse and neglect in institutions, schools, and community settings; the right to free and appropriate education, access to Assistive Technology (communication devices, education aids); and insurance discrimination. They assist numerous others with claims relating to family law, child support, family preservation, subsidized housing, welfare, consumer complaints, unemployment compensation and driver's license reinstatement. They litigate cases for persons living with HIV or AIDS on a variety of matters including, estate planning, guardianships, discrimination, bankruptcy and insurance disputes. They take on cases raising claims of unconstitutional conditions of confinement in Wisconsin's prisons and represent churches and other non-profit entities with their legal needs. Nevertheless, approximately 42,300 of the individuals seeking relief in Wisconsin's courts had to represent themselves. The Legal Services Corporation, which was created in 1974 to provide legal

assistance to low-income Americans, estimates that four out of every five income-eligible people who apply for assistance are turned away because of the lack of resources to help them all. Legal Services Corporation, "Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress" (2000). Simply put, there are not enough lawyers to meet the needs of all of the persons who want or need their help.

Plaintiff's case is not exceptional and neither are his circumstances. As noted above, he will be provided with this court's procedural rules to assist him in bringing or defending against a motion for summary judgment, and his motions and other papers will be construed generously by the court to determine whether they fit within the Federal Rules of Civil Procedure. If this case goes to trial, plaintiff will receive written instruction about the manner in which the trial will be conducted and what he will be expected to prove. There are no exceptional circumstances which would justify appointing him counsel; consequently, his motion will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Clayton Hardy Mellender's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondent Dr. John Doe violated his constitutional rights by refusing to dispense his prescription pain medication and that

respondent Dane County violated his rights under the Eighth Amendment by promulgating and enforcing a policy prohibiting jail inmates from receiving prescribed narcotic medication;

2. Petitioner's motion for appointment of counsel is DENIED without prejudice;

3. Respondents Prison Health Services, Sheriff Gary Hamblin and Captain Mike Plumer are DISMISSED from this lawsuit;

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondents or to respondents' 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 $344.90; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

7. Until respondent Doe is identified, he cannot be served with petitioner's complaint. Therefore, the court will arrange for service of petitioner's complaint on respondent Dane County. Once the county has answered petitioner's complaint, a preliminary pretrial conference will be held at which the magistrate judge will set a deadline

for the county to identify respondent Doe and for petitioner to amend his complaint to name him and for service of the amended complaint on respondent Doe.

Entered this 13th day of July, 2006.

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