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

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ORLANDO LEWAYNE PILCHER,

Petitioner, OPINION and ORDER

v. 09-cv-46-slc[1]

BUREAU OF PRISONS, ROBERT FENTON,
CONSTANCE REESE, LEROY PITTS,
MR. CHEATA, MS. DAWSON,
MS. ANDERSON, A. BROWN,
MS. MONGHOMARY, W. LYNCHARD,
MS. BURK, MR. TRU-X, ANTHONY CHAMBERS,
MR. MARTENEZ, MS. TAYLOR,
MS. CROCKETT, MS. ANDREWS,
MR. JACKSON, MR. RANDEL,
MARK GENNARO, L. STUBBLEFIELD,
MS. BLAND, MS. BANKS, MS. CREGG,
MR. WILLIAMS, MR. WESTLEY,
MS. WHITEHORN, MS. MONPHRY,
MS. JHONSON, MS. BRAWLEY,
MS. MASSEY, MS. RICHARD,
MS. JACKSON, MS. HARVEY,
MS. LYNCHORD,
JOHN DOE, Property Officer/Transine Officer,
MR. PHILLIPS, MS. MARTENEZ,

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[1] While this court has a judicial vacancy, it is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the purpose of issuing this order only, I am assuming jurisdiction over the case.

S. McCOY, S. COLEMAN, MS. MILTON,
MS. HOLINKA, MS. FEATHERS,
MR. TRATE, MR. GLEASON,
MR. TERRI, CARL CRAWFORD,
JANE DOE, Captain Secretary,
C. RUSSELL, JAMES REED,
T. EDUGECOMB, MR. SHANKS,
MS. PEASE, MR. POLK, MR. ASBERRY,
MR. HARRISON, MR. LEE,
MR. NUNSOME, W. TONN R. SERNA
and MR. TIKKANNE,

Respondents.

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Petitioner Orlando Lee Pilcher has responded to the court's March 18 and March 31 orders directing him to narrow his complaint so that it complies with Fed. R. Civ. P. 20. In the March 18 order, I informed petitioner that his complaint contained at least two separate lawsuits: one arising out of events at the Federal Correctional Institution in Yazoo City, Mississippi and one arising out of events at the federal prison in Oxford, Wisconsin. I instructed petitioner to choose one lawsuit that he would prosecute under the number assigned to this case and to pay a separate filing fee for the second lawsuit or dismiss it voluntarily. In his response, petitioner has chosen to proceed with the Mississippi lawsuit and to dismiss the Wisconsin lawsuit. Accordingly, I will dismiss petitioner's complaint as to the claims arising out of the events in Wisconsin. These include his claims against respondents Holinka, Feathers, Trate, Gleason, Terri, Crawford, Russel, Reed, Edugecomb,

Shanks, Pease, Polk, Asberry, Harrison, Lee, Nunsome, Tonn, Serna and Tikkanne.

With respect to petitioner's "Mississippi" claims, I must screen the complaint under 28 U.S.C. § 1915 to determine whether petitioner has stated a claim upon which relief may be granted. Having done so, I conclude that petitioner may proceed on his claim for excessive use of force against respondent Fenton. His claim against the Federal Bureau of Prisons must be dismissed because federal agencies may not be sued under the Constitution. FDIC v. Meyer, 510 U.S. 471, 486 (1994). The remaining respondents must be dismissed because petitioner has failed to give them notice of his claims as required by Fed. R. Civ. P. 8.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). In his complaint, petitioner fairly alleges the following facts.

ALLEGATIONS OF FACT

In September 2007, petitioner Orlando Lewayne Pilcher was incarcerated at the Federal Correctional Institution in Yazoo, Mississippi. During "an early morning disturbance (riot)" on September 29, 2007, respondent Robert Fenton (a lieutenant at the prison) "deliberately" hit petitioner on the head with an aluminum cannister of tear gas. The cannister knocked petitioner unconscious, fractured his jaw, "dented [his] skull," "split

[his] ear right apart" and caused significant bleeding and swelling.

When petitioner woke up, he was weak, dizzy and hot. Blood was "pouring out" of his right ear. He vomited in front of respondent Dr. Martenez, who informed "the institution" that petitioner needed "outside medical treatment" immediately. (Later, Martenez "fabricated" petitioner's "medical report.")

Respondent Jackson and another office transported petitioner to the hospital. When both officers refused to answer questions from the doctor about the cause of petitioner's injury, petitioner explained the situation himself. After the doctor examined petitioner's head, he ordered a scan of petitioner's brain, which revealed that petitioner had a concussion and a blood clot.

No one from the prison notified petitioner's family. Respondent Constance Reece (the warden) lied to petitioner's family, saying that he "wasn't housed inside her prison." The "entire institution had actual knowledge about [petitioner's] injury" because "everyone" watched a videotape of the incident.

Petitioner continued to suffer from "a lot" of pain. However, he was discharged from the hospital after only two days, despite his protest that he was not well enough to leave. At the prison, petitioner complained that "something wasn't right because [his] vision went out in seconds" and he had "an itching reaction and burning sensation" in his head. "[T]he institution" discovered that petitioner was "bleeding from a leakage inside [his] head." The

"itching reaction" came from "poisonous gas" from the tear gas cannister.

DISCUSSION

Petitioner's primary claim is that respondent Robert Fenton "deliberately" hit him with a tear gas cannister. Although petitioner lists a number of legal theories in his complaint, the only one that is applicable is a claim for excessive force under the Eighth Amendment. In determining whether an officer has used excessive force against a prisoner, the question is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320 (1986). The factors relevant to making this determination include:

- the need for the application of force
- the relationship between the need and the amount of force that was used
- the extent of injury inflicted
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them
- any efforts made to temper the severity of a forceful response

Id. at 321. In Hudson v. McMillan, 503 U.S. 1, 9-10 (1992), the Court refined this standard, explaining that the extent of injury inflicted was one factor to be considered, but

the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than a minimal amount of force.

I conclude that petitioner has alleged the minimum facts necessary to state a claim upon which relief may be granted. If respondent Fenton hit petitioner "deliberately" as petitioner alleges, it is plausible to infer at the pleading stage that petitioner may be able to satisfy the standard for excessive force.

Petitioner should be aware that the standard for proving excessive force is a demanding one. In Whitley, 475 U.S. at 324-25, officers shot a prisoner in the knee with a shotgun during an attempt to quell a prison disturbance. The Supreme Court concluded as a matter of law that the officers had not violated the Eighth Amendment. It found that, even though the prisoner had not been involved in the disturbance, the officers could have viewed the prisoner's conduct just before the shot as threatening. The Court emphasized the intense nature of the situation and the short time in which the officer had to decide whether to shoot. Thus, to prove his claim, it will not be enough for petitioner to show that respondent Fenton hit petitioner because he was in the line of fire. Rather, he will have to show that Fenton hit him "for the very purpose of causing harm." Whitley, 475 U.S. at 320.

As I noted in the March 18 order, petitioner's claim against respondent Fenton may be vulnerable to a motion to dismiss for lack of personal jurisdiction or motion to transfer for improper venue. Lodholz v. Puckett, No. 03-C-350-C, 2003 WL 23220723, *5 (W.D.

Wis. Nov. 24, 2003); Thomas v. Corrections Corp. of America, 2003 WL 23274508, *2 (W.D. Wis. June 24, 2003). However, because I do not know with certainty what Wisconsin contacts respondent Fenton might have and because both lack of personal jurisdiction and improper venue can be waived, Moore v. Olsen, 368 F.3d 757, 759 (7th Cir. 2004), I will not dismiss or transfer the case at this time.

Petitioner names dozens of additional respondents, but he includes few facts about any of them. Respondents Martenez, Jackson and Reese are the only three officials that petitioner discusses as part of the factual narrative in his complaint. However, he fails to identify any actions by these respondents that might have violated his constitutional rights.

Petitioner alleges that Jackson (and a John Doe officer) refused to tell hospital staff the cause of his injury. This might support a claim under the Eighth Amendment if petitioner had been denied appropriate medical care because of a refusal to provide necessary information, but petitioner says that he answered the doctor's questions himself. Thus, Jackson's and the other officer's actions may have been insensitive and rude, but they do not give rise to liability under the Constitution. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

I come to the same conclusion with respect to petitioner's allegation that respondent Reese failed to notify his family about his injury and then falsely denied that petitioner was housed in her prison. Reese may have had a moral obligation to keep petitioner's family informed of his condition and whereabouts, but she did not have constitutional duty to do

so. Even a lie rarely rises to the level of a constitutional violation. If Reese were systematically denying petitioner contact with his family, that could implicate petitioner's familial association rights, e.g., Overton v. Bazzetta, 539 U.S. 126 (2003), but petitioner does not make such a claim.

It is not clear why petitioner wants to sue respondent Martenez. Petitioner says it was Martenez who concluded that petitioner needed hospital care; he does not identify any way in which that decision caused him harm and he does not suggest that Martenez failed to take any action that he should have taken. In a different part of his complaint, petitioner alleges that Martenez "fabricated" petitioner's "medical report," but he provides no context for this allegation. It is impossible to infer from that one allegation that Martenez may have violated petitioner's constitutional rights.

Petitioner says even less about the many remaining respondents: he simply lists their names and job titles, followed by various vague and conclusory statements. With respect to many respondents, he alleges nothing about them except that they were present when he was hit with the cannister. He does not suggest that they encouraged respondent Fenton to throw the cannister at him or even that they might have been able to stop Fenton from doing so. George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) (officers may not be liable for constitutional violation unless they "cause" violation or "participate" in it).

With respect to other named respondents, petitioner seems to believe that prison

officials may be liable to him simply because they are aware of the incident in which he was harmed. For example, petitioner alleges that respondent Johnson "worked around me while being in segregation and informed me that she knew me and [saw] the video on me." However, simply being aware of a past wrong does not provide a basis for liability. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002). To the extent petitioner means to say that Johnson or others are failing to provide him with care he needs now, he does not identify what care he needs or in what way any particular respondent is failing to provide it.

As with his allegations against respondents Martenez, petitioner alleges that other respondents tried to *help* him. For example, with respect to respondent Andrews, he says only that she performed an x-ray on him. He does not suggest that she failed to provide requested treatment or that she used inappropriate medical judgment.

Allegations about other respondents are so vague that it is impossible to tell what the respondent did or did not do. For example, petitioner alleges that some respondents "ignored [his] complaints" or did "illegal things." These allegations are insufficient to provide the notice required by Fed. R. Civ. P. 8.

Perhaps the closest petitioner comes to meeting Rule 8 is with respect to his allegations against respondent Anthony Chamber. Petitioner says that Chamber is a doctor at the prison who "deliberate[ly] prescribed" him "the wrong medication" for his "injury," which caused him "stiffness in [his] neck" and "cramping in [his] side." However, petitioner

does not say how severe these symptoms were or how long they lasted. Thus, it is impossible to tell whether petitioner suffered harm that was serious enough to give rise to an Eighth Amendment violation. Further, petitioner does not identify the "injury" for which the medication was prescribed. If it was for any injury other than the one caused by the tear gas cannister, petitioner would have to file a separate lawsuit, as required by Fed. R. Civ. P. 20.

Petitioner has sued so many individuals without any apparent basis for doing so that it is almost as if he has decided to sue every prison official he has come into contact with since September 29, 2007. Petitioner is free to supplement his complaint to explain more thoroughly any claims he may have. However, before doing so he must keep in mind Fed. R. Civ. P. 20. Any claim he asserts in this case must arise out the same transaction or series of transactions as his claim for use of excessive force. If petitioner wishes to raise unrelated claims against other respondents, he must do so in another lawsuit.

ORDER

IT IS ORDERED that

1. Petitioner Orlando Lewayne Pilcher is GRANTED leave to proceed on his claim that respondent Robert Fenton used excessive force against him, in violation of the Eighth Amendment.

2. Petitioner's request to voluntarily dismiss his complaint as to his claims arising out

of events occurring at the Federal Correction Institution in Oxford, Wisconsin is GRANTED. Petitioner's complaint is DISMISSED as to his claims against respondents Holinka, Feathers, Trate, Gleason, Terri, Crawford, Russel, Reed, Edugecomb, Shanks, Pease, Polk, Asberry, Harrison, Lee, Nunsome, Tonn, Serna, Tikkanne and Jane Doe without prejudice to petitioner's refiling these claims at a later date.

3. Petitioner's complaint is DISMISSED as to his claims against the following respondents for his failure to comply with Fed. R. Civ. 8: Reese, Pitts, Cheata, Dawson, Anderson, Brown, Monghomary, Lynchard, Lynchord, Burk, Tru-X, Chambers, "Mr. Martenez," "Ms. Martenez," Taylor, Crockett, Andrews, "Ms. Jackson," "Mr.Jackson," Randel, Gennaro, Stubblefield, Bland, Banks, Cregg, Williams, Westley, Whitehorn, Monphry, Jhonson, Brauley, Massey, Richard, Harvey, Phillips, McCoy, Coleman, Milton and John Doe. These claims are dismissed without prejudice to petitioner's refiling them in a manner that complies with Rule 8.

4. Petitioner's complaint is DISMISSED as to respondent Federal Bureau of Prisons because federal agencies may not be sued under the Constitution.

5. 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 learns the name of the lawyer that will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show on the

court's copy that he has sent a copy to respondent or to respondent's attorney.

6. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of their documents.

7. Petitioner is to complete the enclosed Marshals Service and summons forms and return them to the court so that his complaint can be served on respondent. Petitioner may have until April 27, 2009, to complete and return the requested forms. If petitioner fails to submit the completed forms by that date, I will dismiss this case for petitioner's failure to prosecute it.

Entered this 13th day of April, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge