IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHNNY BRAMLETT,
Inmate #00251579,

Petitioner,

ORDER

v.

01-C-193-C

JON E. LITSCHER, Secretary,
Department of Corrections;
THOMAS G. BORGEN, Warden,
Fox Lake Correctional Institution; and
RICHARD WESTOVER, Correctional
Officer,

Respondents.

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Johnny Bramlett, who is presently confined at the Fox Lake Correctional Institution in Fox Lake, Wisconsin, 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. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. 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 on three or more previous occasions the prisoner has had a suit 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 seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove 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). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner contends that respondents violated his rights under the Eighth Amendment and under the equal protection clause of the Fourteenth Amendment and were negligent by waiting several minutes before intervening in an assault against him, by failing to train and supervise correctional staff properly, by leaving unsecured mop wringers on the unit, by not treating his injuries for fifteen minutes and by not treating his mental condition. I will grant petitioner leave to proceed on his failure to protect claim under the Eighth Amendment and

on his negligence claim against respondent Westover. I will deny petitioner leave to proceed on his claims of cruel and unusual punishment and deliberate indifference under the Eighth Amendment because petitioner fails to state a claim upon which relief may be granted. Because his equal protection claim is legally frivolous, I will deny him leave to proceed on that claim.

Also before the court is petitioner's motion for appointment of counsel. Because petitioner has not demonstrated that he has made reasonable efforts to secure counsel, I will deny his motion.

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

ALLEGATIONS OF FACT

Petitioner Johnny Bramlett is an inmate at Fox Lake Correctional Institution in Fox Lake, Wisconsin. Respondent Jon E. Litscher is Secretary of the Department of Corrections. Respondent Thomas G. Borgen is Warden of Fox Lake Correctional Institution. Respondent Richard Westover is a correctional officer.

On August 29, 2000, petitioner was in his assigned cell with his back to the door. Inmate Michael Lewis entered petitioner's room without his permission and against institutional policies and struck petitioner repeatedly with a heavy mop wringer. Mop wringers are kept unsecured in the housing unit. In an attempt to avoid serious injury,

petitioner pretended that he was injured. When inmate Lewis continued to attack him, petitioner picked up a chair to use as a shield. With the chair as protection, petitioner was able to back inmate Lewis out of his cell and into the dayroom. Petitioner hoped to attract the attention of respondent Westover who was sitting approximately thirty feet away in a glass security booth. Petitioner yelled for respondent Westover and attracted the attention of about 20 other inmates. Respondent Westover remained in the security booth for several minutes while inmate Lewis continued to beat petitioner with the mop wringer. Petitioner became weak because he has diabetes and because he was recovering from open heart surgery.

After the inmates began cheering loudly, respondent Westover left the security booth and ordered the inmates to "break it up." Respondent Westover had observed inmate Lewis swinging the mop wringer at petitioner repeatedly. Respondent Westover stood watching the attack for about two minutes before he ordered inmate Lewis to drop the mop wringer. Inmate Lewis ignored respondent Westover's orders and continued swinging the mop wringer at petitioner. Respondent Westover returned to the security booth, locked himself inside and called for backup assistance. It took between seven and ten minutes for additional security officers to arrive. The officers put handcuffs on inmate Lewis and petitioner and placed them in temporary lockup.

Petitioner waited between ten and fifteen minutes for nursing staff from the Health

Services Unit to examine and treat his injuries. As a result of the attack, petitioner experienced exploding pain in his head. Petitioner also sustained numerous lacerations and abrasions to his head, eyelid, left upper shoulder, hand and fingers. His left elbow had a cut that was two inches long. His left eye was swollen shut.

Because petitioner believes that he is not safe and secure, he fears inmates, does not trust correctional staff and experiences violent dreams and "occasional violent ideation." Respondents have not tried to facilitate a psychological intervention for petitioner.

Petitioner believes that respondents are deficient in training, disciplining and supervising correctional staff.

DISCUSSION

A. Cruel and Unusual Punishment

Petitioner contends that respondents violated his right to be free from cruel and usual punishment by leaving the mop wringer unsecured, knowing that it could be used as an assault weapon.

The Eighth Amendment imposes a duty on prison officials to provide adequate shelter and prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Although prisoners are

entitled to "the minimal civilized measure of life's necessities," Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)), conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F. 2d 105, 108, 109 (7th Cir. 1971).

Petitioner has failed to allege facts sufficient to support a finding that respondents subjected him to cruel and unusual punishment. The fact that respondents do not secure mop wringers that can be used as weapons does not rise to the level of an Eighth Amendment violation. This omission does not "involve the wanton and unnecessary infliction of pain" or create a condition of confinement that is "grossly disproportionate to the severity of the crime warranting imprisonment" under Rhodes, 452 U.S. at 347. At best, respondents were negligent in failing to secure the mop wringer. Because his cruel and unusual punishment claim fails to state a claim upon which relief may be granted, I will deny petitioner leave to proceed on this claim.

B. Failure to Protect

Petitioner contends that respondents failed to protect him in violation of the Eighth Amendment by not intervening in the assault more quickly and by inadequately training, disciplining and supervising its correctional staff.

The Eighth and Fourteenth Amendments give prisoners a right to remain safe from assaults by other inmates. See Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996). "'[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" Farmer v. Brennan, 511 U.S. 825 (1994). "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' see Hudson v. Palmer, 468 U.S. 517, 526 (1984), having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." Farmer, 511 U.S. at 833.

In a case alleging a defendant's failure to protect a prisoner from harm, "[t]he inmate must prove a sufficiently serious deprivation, i.e., conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). The inmate also must prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively condon[ing] the attack by allowing it to happen." Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996) (quoting Haley v. Gross, 86 F.3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be assaulted and failing to take reasonable protective measures. See Farmer, 511 U.S. at 847. The prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and the official must draw that inference. See Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir.

1996). The prisoner does not have to show that the prison official intended that the prisoner be harmed; it is enough that the official ignored a known risk to the prisoner's safety. See id. at 208. In failure to protect cases, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991).

Petitioner alleges that respondent Westover knew that petitioner was being attacked but allowed the attack to continue for several minutes before intervening, effectively condoning the violence. Specifically, petitioner alleges that he yelled to respondent Westover when the altercation moved to the dayroom, that respondent Westover did not leave the security booth until petitioner's yells had attracted about twenty inmates, that respondent Westover stood and watched the assault for two minutes before he told inmate Lewis to drop the mop wringer and that he returned to the security booth without stopping the assault. Petitioner has alleged facts sufficient to support a claim that respondent Westover failed to protect him in violation of the Eighth Amendment. Petitioner will be granted leave to proceed on this failure to protect claim against respondent Westover.

Petitioner asserts also that respondents failed to train, discipline and supervise correctional staff properly. However, petitioner has alleged no facts supporting this conclusion. To the contrary, respondent Westover's acts suggest that he had received some training in managing violent acts. Respondent attempted to stop the attack single-handedly.

When he was not successful, he returned to the security booth to call for assistance. Although respondent Westover may not have acted with appropriate haste, the pattern of his acts follow a reasonable course of action. Without facts supporting his contention, petitioner's claim that respondents failed to train, discipline or supervise correctional staff properly does not raise a viable Eighth Amendment claim and will be denied.

C. Deliberate Indifference to Serious Medical Need

Petitioner contends that respondents were deliberately indifferent to his serious medical needs by not providing psychological attention and by delaying or denying proper medical attention following the assault.

To state an Eighth Amendment claim of cruel and unusual punishment arising from improper medical treatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). A condition is serious if "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997). Deliberate indiffersence 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. 824, 837 (1994). Inadvertent error, negligence, gross negligence and

ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. Detella, 95 F.3d 586, 590-91 (7th Cir. 1996).

Petitioner has failed to allege facts sufficient to establish that he had a serious medical need following the attack or that respondents were deliberately indifferent to that need. Petitioner alleges that he sustained several abrasions and lacerations, one of which was two inches long. He experienced exploding pain in his head during the attack and his left eye became swollen shut after the attack. However, he fails to allege facts to show that respondents' delay in treating these injuries resulted in "further significant injury or the unnecessary and wanton infliction of pain." Gutierrez, 111 F.3d at 1373. In addition, the alleged facts show that petitioner waited for as long as fifteen minutes to receive medical attention after the altercation. Having to wait fifteen minutes on one occasion is not an exorbitantly long delay of medical treatment, especially when petitioner fails to allege that his injuries demanded more immediate treatment. See id. at 1375 (isolated occasion or two when inmate did not receive prompt treatment were "simply isolated instances of neglect, which taken alone . . . cannot support a finding of deliberate indifference").

Petitioner also alleges that he experiences a fear of inmates, a lack of trust in correctional staff, violent dreams and "occasional violent ideation" but that respondents have taken no steps to provide psychological treatment for him. Even if petitioner's mental

condition constitutes a serious medical need, petitioner has failed to allege facts demonstrating that respondents have been deliberately indifferent to his condition. Petitioner has not alleged any facts suggesting that respondents are aware of facts from which they could infer that there was a substantial risk of serious harm to petitioner or that they drew that inference. See Farmer, 511 U.S. at 837. Accordingly, I will deny petitioner leave to proceed on this claim because he has failed to state a claim upon which relief may be granted.

D. Equal Protection

Petitioner contends that respondents violated his right to equal protection by treating him differently from other similarly situated inmates under their supervision.

The equal protection clause of the Fourteenth Amendment prohibits state actors from applying different legal standards to similarly situated individuals. If a petitioner demonstrates he has been treated differently from similarly situated persons because of his membership in a suspect class or the exercise of a fundamental right, the court applies heightened scrutiny to the constitutionality of the act or statute. See Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996).

The facts of petitioner's case do not lend themselves to an equal protection claim. Petitioner does not allege facts from which an inference may be drawn that he was treated

differently from similarly situated persons. Nothing in the alleged facts suggests that respondent Westover would have intervened more quickly if another inmate had been attacked. The allegations do not suggest that a similarly situated inmate would have received medical attention more quickly. Petitioner's allegation that respondents have failed to train the correctional officers properly does not indicate that petitioner was singled out. Because petitioner fails to allege facts to suggest that he was treated differently from similarly situated individuals, his equal protection claim will be dismissed as legally frivolous.

E. State Law Claim

Because petitioner has raised a viable federal law claim, this court has discretion to exercise supplemental jurisdiction over petitioner's state law claims that are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Petitioner contends that respondents violated state law by engaging in criminal negligence under Wis. Stat. § 939.25. Because § 939.25 is a criminal provision and petitioner does not have the authority to prosecute crimes, I understand petitioner to allege that respondents were negligent by failing to protect him from harm. In Wisconsin, the elements of a negligence claim are: "(1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." Antwaun A. v.

Heritage Mutual Insurance Co., 228 Wis. 2d 44, 596 N.W.2d 456 (1999). For the same reasons stated in the discussion of the Eighth Amendment failure to protect claim, I will grant petitioner leave to proceed against respondent Westover on his state law claim of negligence for not stopping the assault more quickly.

F. Motion to Appoint Counsel

Petitioner has requested that counsel be appointed to assist him. In determining whether counsel should be appointed, I must find first that petitioner has made reasonable efforts to retain counsel and was unsuccessful or that he was precluded effectively from making such efforts. See Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Petitioner must provide the court with the names and addresses of at least three lawyers whom he has asked to represent him in this case and who have declined to take the case before I can find that he has made reasonable efforts to secure counsel.

Petitioner should be aware that if he attempts to obtain a lawyer and is unsuccessful, that does not mean that one will be appointed for him automatically. At that point, the court must determine the pro se plaintiff's abilities and skills in light of the complexity of the legal issues and evidence in the case. See Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). "The simpler the case, the less intelligent or experienced the Plaintiff need be to handle it without assistance of counsel." Id. at 321. This case is simply too new to permit

the court to assess petitioner's abilities. Therefore, his motion for the appointment of counsel will be denied, without prejudice to his renewing the motion at some later stage of the proceedings.

ORDER

IT IS ORDERED that

1. Petitioner Johnny Bramlett's request for leave to proceed in forma pauperis is GRANTED on his failure to protect and negligence claims against respondent Richard Westover;

2. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to his claims of cruel and unusual punishment and deliberate indifference because petitioner fails to state a claim upon which relief may be granted and with respect to his equal protection claim because it is legally frivolous;

3. Respondents Jon E. Litscher and Thomas Borgen are DISMISSED from this case;

4. Petitioner's motion for appointment of counsel is DENIED;

5. Petitioner should be aware of the requirement that he send respondent a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondent, he should serve the lawyers

directly rather than respondent. 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 respondent or to respondent's lawyers; and

6. The unpaid balance of petitioner's filing fee is $133.92; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 6th day of June, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge