IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD WHITE,

ORDER

Petitioner,

01-C-600-C

v.

Unit Manager LINDA HODDY, Sgt. MATTI, Sgt. HOFFMAN, Officer GOVIER, Officer SHAW, Officer W. BROWN, Officer WIEGEL, Officer L. BROWN, Sgt. BOWDY, Unit Manager HOMPE, Nurse RENEE WALTZ, Lt. GILBERG, Lt. HORNER, and Capt. CALDWELL,

Respondents.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Supermax Correctional Institution in Boscobel, 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. In addition, from his trust fund account statement, it appears that petitioner presently has no

means with which to pay an initial partial payment of the $150 fee for filing his complaint. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), he is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

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 the prisoner has on three or more previous occasions 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 subjected him to excessive force on three separate occasions, were deliberately indifferent to his medical needs and retaliated against him for filing lawsuits. Petitioner will be allowed to proceed on his claims that respondents

Matti, Govier, Shaw, W. Brown, Hoffman, Hompe, Bowdy, Wiegel, and L. Brown used excessive force against him and that respondent Hompe retaliated against him for filing a lawsuit. All other claims will be dismissed.

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

ALLEGATIONS OF FACT

Petitioner is an inmate at Supermax Correctional Institution in Boscobel, Wisconsin. All of the respondents are employees of the institution: respondents Govier, Shaw, W. Brown, Wiegel and L. Brown are officers; respondents Matti, Hoffman and Bowdy are sergeants; respondents Gilberg and Horner are lieutenants; respondents Hoddy and Hompe are unit managers; respondent Caldwell is a captain; and respondent Waltz is a nurse.

1. February 1, 2000 Incident

On February 1, 2000, plaintiff was served Nutri Loaf for dinner. Believing that he was served Nutri Loaf in error, petitioner stuck his right arm out his cell's lower trap door in an attempt to get the attention of respondents Matti and Govier. In response, respondents Matti and Govier intentionally slammed petitioner's hand in the trap door in an effort to force petitioner to pull his arm back into his cell. Respondents Matti and Govier continued in this course of action until they noticed that petitioner's thumb was bleeding.

Respondents' actions were not in keeping with their training and caused a cut on petitioner's thumb that required five stitches to close. The following day, petitioner complained to respondent Hoddy about the events of the night before. Although respondent Hoddy promised to investigate the matter, she never got back to petitioner. On April 25, 2000, petitioner filed a complaint in federal court against respondents Matti, Govier, Hompe and a Sergeant Haney, alleging that they used excessive force against petitioner in violation of his Eighth Amendment rights. I granted petitioner leave to proceed against respondents Matti and Govier, but denied petitioner leave to proceed against respondent Hompe or Sergeant Haney. On October 20, 2000, defendants Matti and Govier prevailed on a motion for summary judgment based on petitioner's failure to exhaust his administrative remedies and I ordered the case dismissed. On January 11, 2001, I entered an order clarifying the fact that the dismissal was without prejudice.

2. June 23, 2000 Incident

On June 23, 2000, plaintiff was moved from cell 313 into cell 404. Along the way, petitioner was taken to a shower strip search cage and strip searched. After the search, respondent Hompe ordered respondents Shaw, W. Brown and Hoffman to place a mask over petitioner's face. Petitioner was then escorted to cell 404, where the cell door's wrist strap was secured to petitioner's right wrist. Still wearing the face mask, petitioner was then

placed in cell 404. Respondents Shaw, W. Brown and Hoffman then removed petitioner's handcuffs, whereupon petitioner, whose right wrist was still strapped to the cell door, used his left hand to remove the mask from his face and throw it into his cell and out of his reach. Respondent Hompe then ordered respondents Shaw, W. Brown and Hoffman to use force on petitioner in order to force petitioner to pass them the mask, even though it was clear to respondents that the mask was out of petitioner's reach because his right wrist was still strapped to the cell door. Respondents Shaw, W. Brown, and Hoffman all grabbed the door strap and pulled it forcefully, causing petitioner's face to smash into the cell door. As a result of respondents' actions, petitioner received deep cuts over the bridge of his nose and his left eye. Respondent Hoffman bent and twisted petitioner's right wrist. All during the course of these events, petitioner never resisted or made any threatening moves. Petitioner believes that respondent Hompe's order to use force against petitioner was motivated by a prior lawsuit petitioner filed against respondent Hompe. Respondent Hompe brought a nurse to look at petitioner's cuts. The nurse in turn notified a doctor, who closed the cuts above the bridge of petitioner's nose and eye with three and four stitches, respectively.

3. February 6, 2001 Incident

On February 6, 2001, petitioner received his bedtime medication from respondent Waltz, who was accompanied by respondents Bowdy and Wiegel. Petitioner did not receive

the bedtime snack that normally accompanies his medication. Petitioner placed his right arm in his cell trap door in an effort to notify respondent Bowdy of this fact. Respondents Bowdy, Wiegel and L. Brown responded by beating and smashing petitioner's arm with a plastic medication delivery box. Petitioner's arm was cut, bruised and swollen. Respondents Waltz and Hoffman stood by idly while petitioner's arm was struck. Approximately 15 minutes later, respondent Gilberg approached petitioner's cell, and petitioner allowed the staff to close his cell's trap door. When petitioner attempted to show respondent Gilberg the cuts on his arm, Gilberg told petitioner he was only there to deal with petitioner's refusal to take his medication. Respondent Gilberg ordered petitioner to swallow his medication, even though petitioner believed he was unable to do so on an empty stomach. Respondent Gilberg left petitioner's cell and returned twenty minutes later with a cell entry team in order to retrieve petitioner's medication. Respondent Gilberg again ordered petitioner to take his medication, and this time petitioner complied. Respondent Gilberg then left petitioner's cell without addressing the injuries to petitioner's arm. Petitioner was subsequently moved to a different cell. Thirty to forty minutes later respondent Waltz approached petitioner's cell but left immediately without attempting to treat petitioner's injuries. Petitioner then had to wait two to three hours before receiving medical treatment from another nurse. Petitioner asked respondents Gilberg, Horner, and Caldwell to photograph his injuries but his request was denied even though policies and procedures require documentation whenever a prisoner

receives a minor or major injury. Petitioner believes this was done to cover up the "assault" carried out on him.

OPINION

I understand petitioner to contend that respondents subjected him to excessive force and were deliberately indifferent to his medical needs in violation of the Eighth Amendment and retaliated against him for filing lawsuits against prison officials in violation of the First Amendment.

A. Eighth Amendment: Excessive Force

Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. Whitley v. Albers, 475 U.S. 312, 321 (1986).

Petitioner's excessive force claims stem from three separate incidents: the first on

February 1, 2000; the second on June 23, 2000; and the third on February 6, 2001. I will analyze each incident separately.

1. February 1, 2000

The February 1, 2000 incident has already been the subject of proceedings in this court. On April 25, 2000, petitioner filed a proposed complaint with this court stemming from that incident, in which he named respondents Matti, Govier, Hompe and a Sergeant Haney as proposed defendants. I granted petitioner leave to proceed against respondents Matti and Govier, but denied him leave to proceed against respondent Hompe and Sergeant Haney. White v. Officer Matti, No. 00-C-237-C, slip op. at 4-6 (order entered May 26, 2000). Petitioner's suit was later dismissed without prejudice because he had failed to exhaust his administrative remedies. Petitioner now alleges that he has satisfied the exhaustion requirement and seeks leave to proceed against respondents Matti and Govier, alleging that their actions on February 1, 2000 amounted to the application of excessive force in violation of the Eighth Amendment. Although petitioner no longer seeks leave to proceed against respondent Hompe or Sergeant Haney based on that incident, he has added a new proposed defendant, respondent Hoddy. In this court's May 2000 opinion and order granting petitioner leave to proceed against respondents Matti and Govier, I determined that "petitioner's allegation that respondents Matti and Govier slammed the cell

slot door onto his arm and hand until he bled and required stitches is sufficient to state a claim upon which relief may be granted because there does not appear to have been any justification for the use of such force, such as a safety threat to respondents." Id. at 4. I find no reason to depart from this conclusion, and therefore petitioner will be granted leave to proceed against defendants Matti and Govier stemming from the February 1, 2000 incident.

Petitioner also seeks leave to proceed for the first time against respondent Hoddy stemming from the February 1, 2000 incident. Petitioner alleges that on February 2, 2000, he informed respondent Hoddy about the events of the night before, that Hoddy promised petitioner she would look into them, but that Hoddy never got back to petitioner. To establish individual liability under § 1983, petitioner must allege that the individual respondents were involved personally in the alleged constitutional deprivation or discrimination. "'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.'" Vance v. Peters, 97 F. 3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir.1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."). It is not necessary that the defendant participate directly in the deprivation. The official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of

plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). See also Kelly v. Municipal Courts of Marion County, Indiana, 97 F.3d 902, 908 (7th Cir. 1996); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Under this authority, respondent Hoddy is not liable for the deprivation of petitioner's constitutional rights because petitioner has not alleged that Hoddy participated personally in the incident in which petitioner was injured. Petitioner alleges that respondent Hoddy's failure to personally follow up with him represents "deliberate indifference to the excessive force used against" petitioner. This is a legally frivolous argument. Petitioner does not allege that his injuries were not investigated by prison officials. Indeed, petitioner's initial suit stemming from the February 1, 2000 incident was dismissed because *petitioner* failed to exhaust the administrative remedies available to him within the Department of Corrections. While petitioner may have wished respondent Hoddy to conduct her own investigation above and beyond the review process prescribed by Department of Corrections regulations and prepare a personal report for him, nothing, including the United States Constitution, required her to do so. Petitioner will be denied leave to proceed against respondent Hoddy.

2. June 23, 2000

Petitioner alleges that respondents Shaw, W. Brown and Hoffman, at the direction

of respondent Hompe, forcefully pulled a door strap to which petitioner was attached, causing petitioner's face to smash into his cell door causing two cuts, each of which required stitches to close. Petitioner alleges this was done to punish him for failure to retrieve a mask from his cell, even though respondents knew it was impossible for petitioner to reach the mask because he was strapped to his cell door. Petitioner alleges that he never resisted or made any threatening moves to provoke this treatment. Of course, petitioner's own complaint states that he removed the mask he was required to wear and threw it, indicating he may not have been behaving as cooperatively as he suggests. However, at this early stage of the proceedings, petitioner's allegations are sufficient to state a claim of excessive force under the Eighth Amendment against these respondents.

3. February 6, 2001

Petitioner alleges that respondents Bowdy, Wiegel and L. Brown beat and smashed petitioner's arm with a plastic medication delivery box when he tried to get their attention by sticking his arm out of his cell's trap door. As a result, petitioner's arm was cut, swollen and bruised. Petitioner also alleges that respondents Waltz and Hoffman stood by idly while his arm was struck. Again, at this early stage, petitioner's allegations are sufficient to state a claim of excessive force against respondents Bowdy, Wiegel and L. Brown. Petitioner will also be granted leave to proceed against respondent Hoffman, because it is possible that he

had a duty to attempt to stop respondents Bowdy, Wiegel and L. Brown. Petitioner will be denied leave to proceed against respondent Waltz. It is true that even non-supervisory police officers have a duty to intervene to prevent the use of excessive force because "one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person." Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972). However, respondent Waltz is neither a police officer nor a prison guard with a "duty to enforce the laws and preserve the peace." Id. According to petitioner's proposed complaint, respondent Waltz is a nurse whose only job was to dispense medicine. The guards who allegedly assaulted petitioner were present in order to insure Waltz's security. Petitioner does not allege facts suggesting that nurse Waltz's failure to interpose herself between the guards tasked with protecting her and petitioner was "unreasonable in light of the circumstances." Id. at 10 (quoting Huey v. Barloga, 277 F. Supp. 864, 872 (N.D. Ill. 1967)). Petitioner will be denied leave to proceed against respondent Waltz.

Petitioner also alleges that respondents Gilberg, Horner and Caldwell refused petitioner's request that they photograph his injuries. Petitioner maintains that this violates a policy or procedure, which petitioner fails to identify, that requires any major or minor injury suffered by a prisoner to be documented. Petitioner fails to allege that his injuries were not documented; he merely alleges they were not photographed. This fails to state a

claim upon which relief may be granted.

Finally, I note that at least at this early stage, it appears that petitioner's claims do not duplicate the excessive force claim of a class of inmates in Jones 'El v. Berge, No. 00-C-421-C, because petitioner does not allege that he suffers from a mental illness. (One of the questions certified for class treatment in that case is whether excessive force is used against mentally ill inmates at Supermax because guards at the prison are not properly trained). Therefore, there is no need to stay the proceedings relating to the merits of petitioner's claims until this court rules on the constitutionality of the claims in the Jones'El case.

B. Eighth Amendment: Deliberate Indifference to Medical Needs

Petitioner contends that respondents Gilberg and Waltz were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment because they did not immediately treat his cut and swollen arm. 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)). 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). Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they 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 (1993). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance, 97 F.3d at 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91. Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Petitioner fails to state a claim that respondents were deliberately indifferent to his serious medical needs. Petitioner's proposed complaint acknowledges that his arm was

eventually treated. He merely objects to the fact that respondents did not immediately treat his arm, requiring him to wait a few hours before being treated by a nurse on the third shift. Occasional or isolated instances of delay will generally not support a finding of deliberate indifference. See Gutierrez, 111 F.3d at 1374-75. The fact that petitioner had to wait a few hours before his arm was treated certainly will not. Petitioner will be denied leave to proceed on his inadequate medical treatment claim.

C. First Amendment: Retaliation

Petitioner alleges that the June 23, 2000 incident in which he sustained cuts over his eye and nose was ordered by respondent Hompe as retaliation for a lawsuit petitioner had previously filed against Hompe. Prison officials may not retaliate against inmates for the exercise of a constitutional right. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, petitioner need not present direct evidence in the complaint; however, he must "'allege a chronology of events from which retaliation may be inferred.'" Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (quoting Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985)). It is insufficient to allege the ultimate fact of retaliation. Benson, 761 F.2d at 342. Petitioner contends that respondent Hompe ordered the use of excessive force against him in retaliation

for petitioner's lawsuit that named Hompe as a defendant. Although petitioner's complaint contains few facts supporting this allegation, to state a cause of action he "need only allege a chronology of events from which retaliation may be inferred." Black, 22 F.3d at 1399; DeWalt v. Carter, 224 F.3d 607, 618-19 (7th Cir. 2000). Petitioner alleges he filed a lawsuit naming respondent Hompe as a defendant on April 25, 2000 and that in response Hompe retaliated by ordering that excessive force be used against petitioner on June 23, 2000. At this early stage of the proceedings, this chronology is sufficient to state a retaliation claim against respondent Hompe.

ORDER

IT IS ORDERED that

1. Petitioner's motion for leave to proceed in forma pauperis on his claim that respondents Matti and Govier used excessive force against him in violation of the Eighth Amendment on February 1, 2000 is GRANTED;

2. Petitioner's motion for leave to proceed in forma pauperis on his claim that respondents Shaw, W. Brown, Hoffman and Hompe used excessive force against him in violation of the Eighth Amendment on June 23, 2000 is GRANTED;

3. Petitioner's motion for leave to proceed in forma pauperis on his claim that respondents Bowdy, Wiegel, L. Brown and Hoffman used excessive force against him in

violation of the Eighth Amendment on February 6, 2001 is GRANTED;

4. Petitioner's motion for leave to proceed in forma pauperis on his claim that on June 23, 2000 respondent Hompe ordered the use of excessive force against him in retaliation for a lawsuit petitioner filed on April 25, 2000 naming respondent Hompe as a defendant is GRANTED;

5. Petitioner's motion for leave to proceed in forma pauperis on all other claims is DENIED for his failure to state a claim upon which relief may be granted;

6. Respondents Hoddy, Gilberg, Horner, Caldwell and Waltz are DISMISSED from this case.

7. Petitioner 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 lawyers who will be representing respondents, he should serve the lawyers 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' lawyers; and

7. The unpaid balance of petitioner's filing fee is $150.00; 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 16th day of November, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge