IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM FLOWERS,

Petitioner,

v.

WAYNE HANNES; JANE and JOHN DOE, of Sand Ridge Treatment Center, each in their individual capacity and in their official capacity,

Respondents.

ORDER

01-C-0618-C

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This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Sand Ridge Secure Treatment Facility in Mauston, 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 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. Petitioner's request for leave to proceed in forma pauperis will be denied because his claim that respondents violated his Fourteenth Amendment rights is legally frivolous. In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Flowers is confined at the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin pursuant to Wisconsin's Sexually Violent Persons Law, Wis. Stats. ch. 980. Respondent Hannes is the supervisor of Unit AA at the Sand Ridge Secure Treatment Facility and is responsible for the unit's operation and for training and supervising staff who treat respondent Flowers. Respondent Jane and John Does are Unit AA staff.

On October 6, 2001, Unit AA staff did not permit petitioner to advance to level three. Respondent Hannes told petitioner that institution rules prohibited petitioner's advancement to level three because he had received one warning and two counsels and that petitioner would be kept on level two for another thirty days. Taking respondent Hannes at his word, petitioner did not appeal this decision because petitioner had indeed received one warning and two counsels. On October 9, 2001, petitioner learned that a fellow patient

at Sand Ridge, Willie Hogan, had been advanced to level three despite the fact that he had also received one warning and two counsels during his thirty day stay on level two. Hogan told petitioner that he had been advanced to level three after seeking review of the decision to hold him at level two, at which time Hogan learned that the decision to keep him at level two was erroneous. Institution rules provide that two warnings, not one, are required to keep a patient at level two. Respondent Hannes knows he misinformed petitioner about the rules. Had Hannes not misinformed petitioner, petitioner would have appealed the decision to keep him on level two and won. Respondents refuse to take responsibility for their erroneous application of the institution's rules.

OPINION

I understand petitioner's complaint to allege that respondents violated his right to due process under the Fourteenth Amendment by failing to advance him from level two to level three, even though institution rules entitled him to that promotion. Unlike criminal offenders who may be subject to punishment as long as such punishment is not cruel and unusual under the Eighth Amendment, pretrial detainees or persons civilly confined (including those confined under Chapter 980) may not be punished. Youngberg v. Romeo, 457 U.S. 307, 320 (1982); Bell v. Wolfish, 441 U.S. 520, 535 (1978) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the

protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee."). Punishment of civilly confined patients violates their substantive due process rights under the Fourteenth Amendment. Youngberg, 457 U.S. at 320. The question is whether respondents' failure to advance petitioner to level three was punitive.

Youngberg holds that in examining whether conditions of civil confinement are punitive, "courts must show deference to the judgment exercised by [a] 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. Decisions made by such professionals are "presumptively valid." Id. at 323. Liability arises only "when the decision by the professional is such a departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." Id. Thus, in order to overcome the presumptive validity of respondents' decisions and to give rise to an implication 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 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, in order to make out an arguable basis for his claim, petitioner must allege facts that indicate that respondents are acting more than negligently.

As an initial matter, the only allegation petitioner makes against respondent Jane and John Does is that they failed to advance him to level three. At best petitioner's alleged facts as to these respondents show that they negligently applied to him the institutional guidelines for transfers between levels of confinement. Petitioner has pleaded no facts suggesting that he was retained on level two by respondent Jane and John Does because of personal animus or out of a desire to punish him. Petitioner emphasizes that another patient, Willie Hogan, was denied promotion to level three for the same reasons as petitioner, but was subsequently promoted when the mistake was discovered on appeal. However, unlike Hogan, petitioner concedes that he never appealed the decision to keep him on level two. Although the decision to retain petitioner on level two may have been incorrect, the fact that petitioner chose not to challenge the allegedly erroneous decision through the appeal process and instead chose to immediately file a lawsuit in federal court does not demonstrate that respondent Jane and John Does intended to punish him. I am mindful that institutional staff "may have to make decisions with respect to a number of residents with widely varying needs and problems in the course of a normal day. The administrators, and particularly

professional personnel, should not be required to make each decision in the shadow of an action for damages." Youngberg, 457 U.S. at 324-25. Based on the allegations in petitioner's complaint, I cannot conclude that respondent Jane and John Does' decision to hold petitioner on level two amounted to anything more than simple negligence, much less punishment. Petitioner will be denied leave to proceed against respondent Jane and John Does.

That leaves respondent Hannes. Petitioner alleges respondent Hannes misinformed him about the requirements for advancement to level three, leading petitioner to believe an appeal of the decision to retain him on level two would be frivolous. However, petitioner does not allege that promotion decisions fell to respondent Hannes. Rather, he alleges he was denied promotion "by Unit AA staff," who are identified in the complaint as the Jane and John Doe respondents. It is the denial of promotion that petitioner alleges amounts to unconstitutional punishment. The fact that petitioner received misinformation from respondent Hannes upon which he chose to rely does not amount to punishment within the meaning of the Constitution. Even assuming that respondent Hannes deliberately misinformed petitioner about the advancement requirements, petitioner remained free to appeal the erroneous decision to retain him on level two. He chose not to. Petitioner will be denied leave to proceed against respondent Hannes.

Petitioner seems to allege violations of certain Wisconsin statutory provisions related

to the rights of civilly committed patients. Because petitioner will be denied leave to proceed on his Fourteenth Amendment due process claim, he has no viable federal law claim. I decline to exercise supplemental jurisdiction over his state law claims. 28 U.S.C. § 1367(c)(3).

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis is DENIED and his Fourteenth Amendment claim is DISMISSED with prejudice as legally frivolous;

2. Petitioner's state law claims are DISMISSED without prejudice to his refiling them in an appropriate state court;

3. The clerk of court is directed to close the file.

Entered this 7th day of January, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge