IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD ALBERT SCHILLING,

ORDER

Petitioner,

00-C-0315-C

v.

DEPARTMENT OF CORRECTIONS
BUREAU OF HEALTH SERVICES,
DAVID ROSENBAUM, R.N. (B.H.S.),
CAMPSIE TOSON, R.N., FNP-C (B.H.S.),
MICHAEL HART, R.N. (B.H.S.),
THERESA McMANUS, R.N.,

Respondents.

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Judgment was entered in this case on July 18, 2000, dismissing petitioner's Eighth Amendment claim for his failure to exhaust his administrative remedies. On September 14, 2000, petitioner asked that this court reconsider the dismissal because of his attempts to exhaust his administrative remedies. In an order entered September 18, 2000, I asked petitioner to submit proof of exhaustion and on September 26, 2000, petitioner submitted (1) an inmate complaint dated July 20, 2000; (2) the complaint examiner's rejection of the complaint as untimely; and (3) a request for review by the corrections complaint examiner. I

am persuaded that vacation of the July 18, 2000 order is warranted because evolving case law in the Seventh Circuit on application of 42 U.S.C. § 1997e(a) suggests that it may be error to dismiss unexhausted claims at the initial screening stage. 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). Rather, it appears that respondents must raise lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) if they can prove that petitioner has not exhausted the remedies available to him, Therefore, I will grant petitioner's motion for reconsideration and vacate the judgment to allow consideration of petitioner's Eighth Amendment claim.

Because petitioner is a prisoner, I must screen his Eighth Amendment claim and dismiss it if it is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c). In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner was given a tuberculosis skin test on June 23, 1998. The test was read by respondent McManus on June 25, 1998, at 10mm, which would indicate that petitioner either had tuberculosis or had been exposed to it. Petitioner was given no treatment. He was cleared medically to transfer to a Texas jail. He was then transferred.

Upon admission and medical screening, nurses at the health services unit of the Texas jail informed petitioner that he had tested positive for tuberculosis on June 23, 1998, and asked him why he was allowed to be transferred. A nurse called the Wisconsin Department of Corrections on November 4, 1998, and started petitioner on medication immediately.

OPINION

A. Eighth Amendment

I understand petitioner to allege that respondents violated his right to be free from cruel and unusual punishment protected by the Eighth Amendment by deliberately not informing him that he had tested positive for tuberculosis and withholding treatment in order to facilitate his transfer to a Texas jail. The Supreme Court has held that under the Eighth Amendment, prison officials may not be deliberately indifferent to the safety of prisoners. See Farmer v. Brennan, 511 U.S. 825 (1994). A prison official is deliberately indifferent when he "knows of and disregards an excessive risk to inmate health and safety; 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." Id. at 837. If respondents knew that plaintiff tested positive for tuberculosis and deliberately did not provide treatment, a trier of fact could conclude reasonably that they had been deliberately indifferent to petitioner's safety in violation of the Eighth Amendment. Accordingly, petitioner will be granted leave to proceed in forma pauperis

against respondent McManus on this claim.

B. Respondents

Petitioner named the Department of Corrections Bureau of Health Services as a respondent in this case. "It is well-settled that a claim against a state or local agency or its officials may not be premised upon a *respondeat superior* theory." Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986) (citing Monell v. Department of Social Services, 436 U.S. 658, 694 (1978)). "The agency must be culpable in its own right, for example by having a policy of violating such rights." Bailey v. Faulkner, 765 F.2d 102, 104 (7th Cir. 1985). Furthermore, the Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989). Therefore, petitioner may not proceed against respondent Department of Corrections Bureau of Health.

In addition, it is well established that liability under § 1983 must be based on the defendant's personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). It is not necessary that a respondent 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, 76l F.2d 360, 369 (7th Cir. l985). Because petitioner has failed to allege that respondents Rosenbaum, Toson or Hart were involved personally in denying him treatment for his tuberculosis, he will be denied leave to proceed against these respondents.

ORDER

IT IS ORDERED that

1. Petitioner Richard Albert Schilling's motion for reconsideration is GRANTED;

2. The order and judgment entered on July 18, 2000, dismissing petitioner's Eighth Amendment claim for failure to exhaust administrative remedies is VACATED;

3. Petitioner's request for leave to proceed in forma pauperis on his Eighth Amendment claim against respondent Theresa McManus is GRANTED;

4. Petitioner's request for leave to proceed in forma pauperis on his Eighth Amendment claim against respondents Department of Corrections Bureau of Health Services, David Rosenbaum, Campsie Toson and Michael Hart is DENIED;

5. Service of this complaint will be made promptly after petitioner submits to the clerk of court one (1) completed marshals service forms and two (2) completed summonses, one for each respondent and one for the court. Enclosed with a copy of this order are sets of the necessary forms. If petitioner fails to submit the completed marshals service and summons forms before November 10, 2000, or explain why he cannot do so, his complaint will be subject

to dismissal for failure to prosecute.

6. In addition, 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 lawyer who will be representing respondent, he should serve the lawyer 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 attorney.

7. The unpaid balance of petitioner's filing fee is $55.90; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 26th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge