IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY JON BONNIN,

ORDER

Petitioner,

03-C-65-C

v.

EAU CLAIRE COUNTY, EAU CLAIRE COUNTY JAIL, EAU CLAIRE COUNTY SHERIFFS, EAU CLAIRE COUNTY JAIL CAPTAIN (LEIBERG),

Respondents.

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This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Jeffrey Jon Bonnin is presently detained by the State of Wisconsin as a patient pursuant to Wisconsin's Sexually Violent Persons Law, Wis. Stat. ch. 980. He 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.[1]

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 will be granted leave to proceed in forma pauperis on his Eighth Amendment claims that he was subjected to excessive force, deprived of food and water for more than 24 hours and provided constitutionally inadequate medical care.

Before describing petitioner's factual allegations, I note that it is unclear where he is currently detained. When petitioner filed his complaint, he was apparently housed at the Wisconsin Resource Center in Winnebago, Wisconsin. However, on February 1, 2003, petitioner informed the court that he expected to be transferred shortly to the "Sandridge Sexually Violent Persons Facility," which I understand to be the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin. However, petitioner has never confirmed that this transfer took place or provided the court with his new address. Nevertheless, I will assume that petitioner is now housed at the Sand Ridge facility.

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[1]Because he is a patient and not a prisoner, petitioner is not subject to the 1996 Prison Litigation Reform Act.

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

ALLEGATIONS OF FACT

On November 12, 2002, petitioner was booked into the Eau Claire County Jail as a Chapter 980 patient. Petitioner told the booking officers that because of safety issues he could not be placed in the jail's general population. Nevertheless, petitioner was put into a general population cell block. Shortly thereafter, several inmates approached petitioner and began to harass him because he had been convicted of sexual assault. Petitioner then asked two jailers if he could be locked in his cell but his request was refused. Petitioner became argumentative in an effort to get the attention of a sergeant. When a sergeant came to petitioner's cell block petitioner asked again to be locked in a cell. At this point, five sheriff's deputies entered the cell block and attempted to handcuff petitioner. When petitioner again asked to be locked in a cell, two officers began spraying pepper spray in his face. Petitioner was then tackled by the three remaining officers and continually sprayed with pepper spray. Petitioner was handcuffed and walked to a holding cell. On the way, petitioner was walked into walls and doors repeatedly. Petitioner struggled to stand and was pepper sprayed again. Petitioner told the officers he had a heart condition and asked to see medical personnel. Eventually, petitioner was slammed face first onto a rubber-coated cement bed, where petitioner believes he lost consciousness.

When petitioner awoke, he could not see or move because of severe chest pain, bruised knees, a swollen face and soreness all over his body. Petitioner pushed the "talk button" on the wall several times but no one answered. Petitioner knocked on the window of his cell and begged for water and to see a doctor, but no one answered. Petitioner asked to visit with his attorney, but was told he would have to wait until the next day. On November 12 and 13, 2002, petitioner requested medical attention several times because of chest pains, shortness of breath and cuts on his arms, but was told by several different sheriff's deputies that he would survive. Petitioner was denied food and water from 6 p.m. on November 12, 2002, until 9 p.m. the following day, when he was returned to the Wisconsin Resource Center. Petitioner asked several officers at the jail for food, as well as the officers who transferred him to the Wisconsin Resource Center, but to no avail.

When petitioner was booked into the jail he had with him two medications for anxiety and voices he hears when he is confined in small spaces. Petitioner requested these medications each time an officer came by his cell but was repeatedly told to get by without them.

On two occasions, visits petitioner had scheduled with his family were cancelled at the last minute.

On November 12 and 13 and December 16, 17 and 18, 2002, petitioner could not use the bathroom in private because of cameras mounted outside his cell.

Petitioner was forced to appear in court for a civil commitment hearing in an orange jumpsuit rather than his civilian clothes, even though he had completed his prison term. Petitioner was also forced to wear handcuffs and shackles around the courthouse.

OPINION

A. Personal Involvement

There are several problems with petitioner's proposed complaint. First, petitioner cannot name the "Eau Claire County Jail" as a respondent. As a physical structure, the "jail" cannot be sued. It is incapable of accepting service of plaintiff's complaint or responding to it. Therefore, respondent "Eau Claire County Jail" will be dismissed.

Second, petitioner's proposed complaint fails to allege any conduct on the part of respondent "Eau Claire County Jail Captain (Leiberg)." Instead, throughout his complaint petitioner refers only generically to "officers," "jailers" or "sheriff's deputies." This is a problem because liability under § 1983 must be based on a respondent'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 the respondent participate directly in the violation. 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, 97 F.3d 902, 908 (7th Cir. 1996. Nevertheless, in a § 1983 action, there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. See Gentry, 65 F.3d at 561; Del Raine, 32 F. 3d at 1047; Wolf-Lillie, 699 F.2d at 869. In short, because petitioner has not specified how respondent Leiberg is connected directly to any of the constitutional violations alleged in his complaint, Leiberg will be likely to succeed on a motion to dismiss unless petitioner amends his complaint promptly to state how Leiberg was personally involved in the violations.

That leaves two respondents: Eau Claire County and "Eau Claire County Sheriffs." I understand the latter respondent to be the Eau Claire County Sheriff. As with respondent Leiberg, petitioner has not alleged that respondent Eau Claire County Sheriff was personally involved in violating his constitutional rights. However, by describing the persons who allegedly mistreated him as "jailers," "officers" and "sheriff's deputies," it appears that petitioner may not know the identities of the individuals who he alleges personally deprived him of his rights. In such a circumstance, a petitioner can name a high official such as respondent Eau Claire County Sheriff, serve that official with his complaint, and then conduct formal discovery to learn the names of the persons directly responsible for allegedly

violating his constitutional rights. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (high official should not be dismissed from pro se complaint for lack of personal involvement when claim involves conditions or practices which, if they existed, would likely be known to higher officials or if petitioner is unlikely to know person or persons directly responsible absent formal discovery). Accordingly, with respect to those claims upon which petitioner will be allowed to proceed, he may proceed against respondent Eau Claire County Sheriff for the purpose of discovering the identities of the "jailers," "officers" and "sherriff's deputies" who allegedly violated his constitutional rights. Once petitioner learns the identities of those individuals, he will have to amend his complaint to name them specifically.

In addition, I will not dismiss respondent Eau Claire County at this early stage of the litigation. The Supreme Court has held that "a municipality cannot be held liable under § 1983 on a respondeat superior theory." Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691 (1978). In other words, a municipality cannot be held liable simply because one of its employees violates an individual's constitutional or federal statutory rights. Instead, the conduct complained of must result from an official municipal policy or custom in order to render the municipality liable. Id. Although petitioner does not make any allegations about the policies or customs of respondent Eau Claire County, I cannot say categorically that it will be impossible for him to discover and allege such official conduct as

this case proceeds.

B. Excessive Force

Petitioner alleges that the Eau Claire County sheriff's deputies beat him and sprayed him with pepper spray without good reason. 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 defendants applied force "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). "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated . . . whether or not significant injury is evident." Id. at 9 (citations omitted). 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); see also Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984):

> [I]t is a violation of the Eighth Amendment for prison officials to use mace or other chemical agents in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain. . . . The use of mace, tear gas or other chemical agent of [] like nature when reasonably necessary to prevent riots or escape or to subdue recalcitrant prisoners does not constitute cruel and

> inhuman punishment, and this is so whether the inmate is locked in his prison cell or is in handcuffs. . . . [T]he use of nondangerous quantities of the substance in order to prevent a perceived future danger does not violate 'evolving standards of decency' or constitute an 'unnecessary and wanton infliction of pain.'

(Internal citations omitted). Petitioner's allegations that he was beaten and continually pepper sprayed without good cause are sufficient to state a claim under the Eighth Amendment.

C. Deliberate Indifference to Medical Needs

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 alleges that on November 12 and 13, 2002, after he was beaten and sprayed, several sheriff's deputies refused him medical attention, telling him simply that he would "survive." Petitioner alleges that during this time period he was suffering from severe chest pains, shortness of breath, a swollen face and cuts on his arms. Petitioner also alleges that jail officers denied him access to his prescription medications repeatedly. These allegations are sufficient to state a claim that respondents were deliberately indifferent to petitioner's serious medical needs. Petitioner will be allowed to proceed on this claim.

D. Conditions of Confinement

Petitioner alleges that despite his numerous requests to jail officials, he was denied food and water at the Eau Claire county jail for a period of more than 24 hours. The "withholding of food is not a per se objective violation of the Constitution." Reed v. McBride, 178 F.3d 849, 853-54 (7th Cir. 1999). Instead, courts "must assess the amount and duration of the deprivation." Id.; see also Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998) (prisoners denied four consecutive meals over two days stated Eighth Amendment claim). At this early stage of the proceedings, petitioner's allegations are sufficient to state an Eighth Amendment claim.

E. Other Claims

Petitioner's other claims are legally frivolous. First, petitioner alleges that on two occasions, visits with his family were denied at the last minute. Although this may have inconvenienced petitioner, it does not rise to the level of a constitutional violation. The same is true of petitioner's allegations that he was made to wait one day before calling his attorney.

Petitioner alleges that on November 12 and 13 and December 16, 17, and 18, 2002, he was denied privacy when he used the bathroom because video cameras were mounted outside his cell. First, petitioner does not allege that he was housed at the Eau Claire jail in

December. Because the only respondents petitioner has named are affiliated with the jail, it is unclear how they would be responsible for depriving petitioner of his privacy in December. In any case, petitioner's claim is foreclosed by Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995), in which the Court of Appeals for the Seventh Circuit considered whether a male pretrial detainee was "entitled to prevent female guards from watching [him] while undressed." The court of appeals rejected the plaintiff's Fourth Amendment privacy claim because prisoners "do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life." Id. at 146 ("[C]onstant vigilance without regard to the state of the prisoners' dress is essential. Vigilance over showers, vigilance over cells - vigilance everywhere, which means the guards gaze upon naked inmates."). In the same case, the court of appeals rejected the plaintiff's substantive due process and Eighth Amendment challenges to cross-gender monitoring. Although petitioner is a civil detainee rather than a prisoner, the same rationale applies. Civil detainees are committed to the custody of the state. Vigilance is required to insure that they pose no threat to themselves or others.

Finally, petitioner alleges that he was forced to appear in court for a civil commitment hearing in an orange jumpsuit, rather than his civilian clothes. Again, petitioner does not make clear when this happened or in whose custody he was at the time this event occurred. That is enough to prevent petitioner from proceeding on this claim. Moreover, although it

is generally true that a state "cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes," Estelle v. Williams, 425 U.S. 501, 512 (1976), that rule is not absolute. For instance, where the fact of the defendant's incarceration is inherent in the nature of the charge (for example, where a defendant is accused of murdering another inmate while confined in prison), there is no violation because "'[n]o prejudice can result from seeing that which is already known.'" Id. at 507 (citation omitted). That is the case here. A petition to civilly commit a person under chapter 980 must allege, among other things, that the "person is within 90 days of discharge or release, on parole, extended supervision or otherwise, from a sentence that was imposed for a conviction for a sexually violent offense." See Wis. Stat. § 980.02. Accordingly, petitioner suffered no prejudice as a result of the prison clothing he wore at his civil commitment hearing.

F. Motion for Appointment of Counsel

Petitioner asks that counsel be appointed to represent him in this case. Before the court can appoint counsel in a civil action such as this, it must find first that the petitioner made a reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). In this court, a petitioner must list the names and addresses of at least three lawyers who

declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Petitioner does not suggest that he has made an effort to find a lawyer on his own and that his efforts have failed.

Second, the court must consider whether the petitioner is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995), citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). This case is too new to allow me to assess petitioner's abilities. Therefore, petitioner's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

ORDER

1. Petitioner Jeffrey Jon Bonnin's request for leave to proceed in forma pauperis against respondents Leiberg, Eau Claire County Sheriff and Eau Claire County is GRANTED on his Eighth Amendment claims that he was subjected to excessive force, deprived of food and water for more than 24 hours and provided constitutionally inadequate medical care.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claims that on two occasions he was denied visits with his family; he had to wait a day to call his lawyer; he did not have privacy while using the bathroom; and he was forced to wear prison clothing at a civil commitment hearing.

5. Respondent Eau Claire county jail is DISMISSED from this case.

6. Petitioner's motion for appointment of counsel is DENIED without prejudice to his renewing it at some later stage of the proceedings.

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 lawyer who will be representing respondents, he should serve the lawyer 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' attorney.

Entered this 27th day of March, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge