IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JAMES KURALLE,

Petitioner, ORDER

v. 04-C-184-C

KRISTEN ANDERSON, Jail Sgt.;
SHERIFF HILLSTEAD, St. Croix County;
KAREN HUMPHRIES, Jail Captain; and
SCOTT JOSEPH BLOM,

Respondents.

- -

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, James Kuralle, who is presently confined at the Dodge Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

In May of 2003, petitioner was confined at the St. Croix County Jail. On May 13, 2003, Judge Edward Vlack issued a "no contact" order, requiring that petitioner and respondent Joseph Blom, another inmate, remain separated. Nevertheless, on May 16, 2003, respondent Kristen Anderson, a sergeant at the jail, allowed Blom to enter a church program that petitioner was attending. Blom attacked petitioner and jail staff intervened.

Blom has been charged in criminal court with the assault.

As jail captain, respondent Karen Humphries is ultimately responsible for carrying out and enforcing court orders assigned to respondent Sheriff Hilstead.

DISCUSSION

"When a state actor . . . deprives a person of his ability to care for himself by incarcerating him, detaining him, or involuntarily committing him, it assumes an obligation to provide some minimum level of well-being and safety." Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998); DeShaney v. Winnebago County Dept. of Social Services,489 U.S. 189, 198-200 (1989). "Only where the state has exercised its power so as to render an individual unable to care for himself or herself may an affirmative duty to protect that individual arise." J.O. v. Alton Community Unit School District 11, 909 F.2d 267, 272 (7th Cir. 1990). I understand petitioner to allege that respondents violated his constitutional right to be free from punishment by failing to protect him from inmate Blom.

It is not clear from petitioner's complaint whether he was a pretrial detainee or a convicted prisoner at the time of the alleged assault. 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 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 pretrial detainees violates their substantive due process rights under the Fourteenth Amendment. Youngberg, 457 U.S. at 320.

Youngberg holds that in examining whether a particular prison condition or act is punitive, "courts must show deference to the judgment exercised by [a] qualified professional." Id. at 321. However, liability would arise "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." 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, if petitioner was a pretrial detainee at the time of the alleged assault, he must allege facts to indicate that respondents acted more than negligently when they allowed respondent Blom into the church program petitioner was attending.

If petitioner was a convicted prisoner at the time of the alleged assault, his complaint

must allege facts from which an inference may be drawn that one or more of the respondents acted with deliberate indifference to his constitutional rights. Wilson v. Seiter, 501 U.S. 294, 298 (1991). The Court of Appeals for the Seventh Circuit has interpreted "deliberate indifference" to require a petitioner to show that any infliction of suffering by prison officials is "either deliberate, or reckless in the criminal law sense." Duckworth v. Franzen, 780 F.2d 645, 653 (1985). Gross negligence is not enough. Id. According to the court, "[cruel and unusual] punishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." Id.

In his complaint, petitioner contends that his injury was "due to [respondents'] negligence." He does not allege that respondent Anderson deliberately brought inmate Blom into the church program to harm him. Nevertheless, construing petitioner's complaint liberally as I must, I will assume at this early stage that petitioner may be able to prove that respondent Anderson knew about Judge Vlack's "no contact" order and acted intentionally to endanger petitioner's safety by bringing respondent Blom into contact with petitioner on May 16, 2003.

Petitioner will not be allowed to proceed on his claims against respondents Sheriff Hillstead, Karen Humphries and Scott Blom. As for respondent Blom, in order to state a claim under 42 U.S.C. § 1983, petitioner must allege that the individual deprived him of a

right secured by the Constitution while the individual was acting under color of state law. See, e.g., Donald v. Polk County, 836 F.2d 376, 379 (7th Cir. 1988). Respondent Blom was not acting under color of state law when he attacked petitioner. Therefore, petitioner's claim against respondent Blom will be dismissed as legally frivolous. If petitioner wishes to sue inmate Blom in a civil action for assault and battery, he must do so in state court.

As for respondents Hillstead and Humphries, it is well established that liability under § 1983 must be based on the 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). 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. Petitioner has not alleged that respondents Hillstead or Humphries arranged, condoned or personally joined in the decision to bring respondent Blom to the church program while petitioner was attending it. Indeed, petitioner alleges only that respondent Humphries is responsible as respondent Hillstead's "top officer" for handling the day to day running of the facility. This is not enough to state a claim of constitutional wrongdoing against either respondent Hillstead and Humphries. Accordingly, these respondents will be dismissed from this action.

ORDER

IT IS ORDERED that petitioner James Kuralle is GRANTED leave to proceed in forma pauperis on his claim against respondent Kristen Anderson for violating his constitutional rights by deliberately endangering his safety.

Further, IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on his claims against respondents Sheriff Hillstead, Karen Humphries and Scott Joseph Blom are DENIED and these respondents are DISMISSED from this action.

- For the remainder of this lawsuit, petitioner must send respondent Anderson a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.
- Petitioner should keep 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 unpaid balance of petitioner's filing fee is $145.51; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).
- A copy of petitioner's complaint and this order will be sent promptly to the United

States Marshal for service on the respondent.

Entered this 6th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge