IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOEL FLAKES,

ORDER

Plaintiff,

04-C-189-C

v.

MATTHEW J. FRANK, NORM POLINSKE, CORRECTIONS CORPORATION OF AMERICA, PHIL KINGSTON, JUDY SMITH, CAROL WETZEL, JANE SONDALLE, DR. ROMAN KAPLAN, DANIEL BENIK, ROBIN BOYD and SGT. DAKEN,

Defendants.

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Defendant Matthew J. Frank removed this action pursuant to 28 U.S.C. § 1441(c), which allows for the removal of state court actions to federal court when the complaint alleges claims arising under federal law. In this action, plaintiff Flakes raises several claims under federal law; including claims under the Americans with Disabilities Act of 1990, 42 U.S.C. § § 12101-12213 et seq., and the First, Eighth and Fourteenth Amendments to the United States Constitution.

Although the petition for removal asserts a proper substantive ground for removal,

it is procedurally deficient. Under the removal statute, it is defendant's burden to explain why his co-defendants have not joined in the petition for removal, Northern Illinois Gas v. Airco Industrial Gases, 676 F.2d 270, 273 (7th Cir. 1982). Nominal, unknown, fraudulently joined and unserved nonresident defendants need not join in a removal petition. 1A Moore's Federal Practice ¶ 0.168[3.-2], at 452 (1982). Otherwise, a petition for removal is deficient if not all defendants join in it. Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994). overruled on other grounds by Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999). "To 'join' a motion is to support it in writing. . . ." Id. (citations omitted).

The record shows that the majority of the defendants have been served with plaintiff's complaint and that service on Frank's co-defendants occurred either before Frank was served or on the same day he was served. Therefore, these defendants should have joined in the removal petition by signing it.

Nevertheless, objections to defects in the removal procedure are waived unless they are made within thirty days after the filing of the notice of removal. 28 U.S.C. § 1447(c); Western Securities Co. v. Derwinski, 937 F.2d 1276, 1279 (7th Cir.1991). "If a case is removed to a court that has original jurisdiction over the type of case, and no objection to removal is lodged, it is as if the plaintiff had sued in the federal district court in the first place." Id. at 1279. Defendant Frank filed the removal petition on March 24, 2004. No

objection to the removal was filed on or before April 23, 2004. Therefore, the defect in the removal procedure is considered waived. Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997).

Now that plaintiff's case is in this court, the complaint must be screened pursuant to 28 U.S.C. § 1915A. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint or any parts of it if, under a liberal construction, it is legally frivolous or 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. 42 U.S.C. § 1915(e).

At the outset I note that plaintiff made allegations of wrongdoing against a number of individuals in his complaint that he did not name as defendants in the caption of his complaint. I have ignored plaintiff's allegations against these individuals.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff is an inmate at the Stanley Correctional Institution in Stanley, Wisconsin. Defendant Matthew Frank is Secretary of the Wisconsin Department of Corrections. At the relevant time, defendant Norm Polinske was a program review coordinator at the Waupun Correctional Institution; defendant Corrections Corporation of America was a private for-

profit corporation that entered into a contractual agreement with the Wisconsin Department of Corrections to house Wisconsin inmates; defendant Phil Kingston was the warden of the Columbia Correctional Institution in Portage, Wisconsin; defendant Judy Smith was the warden at the Oshkosh Correctional Institution; defendant Carole Wetzel was a social worker at the Oshkosh prison; defendant Jane Sondalle was Unit Director at the Oshkosh prison; defendant Dr. Roman Kaplan was a contract physician at Oshkosh; defendant Daniel Benik was the warden at the Stanley Correctional Institution; defendant Robin Boyd was unit manager at Stanley and Sgt. Daken was a correctional officer at Stanley.

At the present time, plaintiff Flakes is in need of a new ball and socket in both hips. He has been dependent on a wheelchair since April 29, 1999. In 1992, Wisconsin doctors diagnosed plaintiff as suffering from bi-lateral hip osteoarthritis and prescribed the use of a cane as needed, two mattresses to relieve pain and stiffness over night and a chair in his cell. On April 29, 1996, new x-rays showed deterioration in plaintiff's condition. On October 23, 1997, new x-rays showed marked changes for the worse. On December 17, 1997, a Dr. Balgada placed plaintiff on medical "no work" status and on February 12, 1998, the program review committee reclassified plaintiff's medical activity level to "no work." However, the committee also reclassified plaintiff to a Tennessee prison owned by defendant Corrections Corporation of America over the recommendation of plaintiff's social worker that he remain at the Waupun Correctional Institution. The program review committee assured plaintiff

that Tennessee had 24-hour medical care.

On March 25, 1998, defendants sent plaintiff by bus on a fourteen-hour trip in shackles and chains to the Tennessee facility. He had to be carried off the bus by transport officers because he could not walk after having stayed so long in one position.

On April 2, 1998, Dr. Schmake examined plaintiff and prescribed pain medication. However, he refused plaintiff's request for his cane, a second mattress and a chair on the ground that it was contrary to Corrections Corporation of America policy to provide these items. Dr. Schmake expressed the view that plaintiff would not have been sent to Tennessee if he had serious medical problems.

In July 1998, defendant Corrections Corporation transferred plaintiff to its Whiteville, Tennessee facility. There, plaintiff met with a Dr. Coble, who told him that the cane, second mattress and chair he wanted could not be provided under the prison's policy. On April 26, 1999, defendant Corrections Corporation of America transported plaintiff to an outside clinic, where he was seen by an orthopedic surgeon. The surgeon recommended that plaintiff be provided a wheelchair and double mattress and that he have hip replacement surgery. Defendant Corrections Corporation gave plaintiff a wheelchair and double mattress, but refused to pay for hip replacement surgery.

On March 29, 2001, plaintiff was transferred out of Tennessee to the Columbia Correctional Institution. On May 17, 2001, the institution received a class III request for

authorization of services for plaintiff to have an orthopedic consultation at the University of Wisconsin hospital. As of July 22, 2003, plaintiff had not had the consultation.

When plaintiff arrived at the Columbia Correctional Institution in March 2001, one of his Bibles was missing. The missing Bible was a collectors item that plaintiff had possessed for over twenty years. As a result of this loss, plaintiff suffers emotional and mental depression. Defendants also took 12 Northwest Reporters from plaintiff and refused to pay for replacements. The loss of these reporters causes plaintiff emotional and mental distress.

On March 5, 2002, plaintiff was transferred to the Oshkosh Correctional Institution. On March 9, 2002, plaintiff met with defendant Carol Wetzel, who was assigned as plaintiff's social worker. It was Wetzel's responsibility to determine plaintiff's special needs. She appeared to take delight in plaintiff's disability and pain, stating "Don't you think you deserve that?" or words to that effect. She told plaintiff he deserved to be in a wheelchair because of his crimes. In 1985, plaintiff was convicted of some "very horrific crimes" that will follow him for the rest of his life.

Plaintiff filed a complaint against Wetzel. An individual named Preice dismissed the complaint as frivolous. Defendant Judy Smith reopened the complaint and sent it back to Preice. Preice then attempted to coerce plaintiff into dropping the complaint on threat of being charged with lying about staff. Plaintiff filed a complaint about Preice's conduct and

defendant Smith dismissed it.

After plaintiff decided to pursue his complaint against Wetzel, staff at the Oshkosh Correctional Institution were hostile toward plaintiff. Defendant Sondalle ordered all staff to harass plaintiff. She personally yelled at plaintiff for no reason other than to express her contempt for him. She joined forces with defendant Dr. Kaplan to insure that plaintiff could no longer take showers on the unit, even though there was a handicap shower on the unit. Instead, plaintiff was made to push himself in the wheelchair to the health services unit, where he was allowed two showers a week.

Defendant Sondalle did not want any of the three aides on the unit to assist plaintiff. There were at least 50 other inmates in wheelchairs being pushed by aides. Sondalle ordered all staff to make sure that if plaintiff wanted to leave the unit, he had "better be pushing [him]self." For this reason, plaintiff could not go to the law library or school, to recreation or the barber shop, all of which were outside the unit. He had to wheel himself to the health services unit every week to get his medication.

In April 2002, defendant Dr. Kaplan discontinued medication plaintiff had been taking for 10 to 11 years. The only way plaintiff could get it back was to pay $7.50 for each medical service.

On January 16, 2003, plaintiff was transferred to the Stanley Correctional Institution. Initially, he was placed in a handicap cell where there was no television stand or cable and

no writing desk. The handicap cell is larger than a regular cell and has a grab bar on one wall. At some point, a shift supervisor moved plaintiff into a regular cell so he could enjoy the same privileges as other prisoners. Two days later, on January 18, 2003, defendant Daken forced plaintiff to return to the handicap cell. When plaintiff resisted, Daken called a Capt. Olson to the unit to place plaintiff in segregation for disobeying orders. Olson did not agree with Daken. Daken then "sought revenge" on one occasion by refusing to retrieve a shower chair from the health services unit so that plaintiff could take a shower. Plaintiff had to stand up to take his shower and his legs and feet became swollen.

When plaintiff arrived at the Stanley Correctional Institution, he was with two other inmates in wheelchairs. Plaintiff is black and the other two inmates are white. The white inmates were given aides. Plaintiff was not. On February 5, 2003, plaintiff filed a grievance complaining about the lack of an aide. Defendant Boyd claimed plaintiff did not need an aide. In mid-March 2003, defendant Boyd hired a white aide to work on plaintiff's wing.

In April 2003, plaintiff filed a grievance about his right to participate in recreational activities and other services and programs after he was not allowed to play basketball in his wheelchair. Around the same time, plaintiff filed a grievance concerning discriminatory practices at the Stanley Correctional Institution. The complaint was rejected. Because of his grievances, Stanley Correctional Institution employees have retaliated against plaintiff by denying him job opportunities.

On April 4, 2003, plaintiff complained to defendant Frank about his poor medical care and defendants' retaliatory conduct, as well as other things. Frank has not interceded on his behalf.

OPINION

Plaintiff alleges that defendants' acts violated his rights under the Americans With Disabilities Act and the United States Constitution. Turning first to plaintiff's ADA claims, I note that the Supreme Court has held that the Americans With Disabilities Act applies to state prisons. Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998). However, the Court of Appeals for the Seventh Circuit has held that claims brought in federal court against state officials or state agencies by private individuals under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 - 12213, are barred by the Eleventh Amendment. Stevens v. Illinois Dept. of Transportation, 210 F.3d 732 (7th Cir. 2000); Erickson v. Board of Governors of State Colleges and Universities, 207 F. 3d 945 (7th Cir. 2000).

In Erickson, 207 F.3d at 952, the court of appeals held that because the ADA does not enforce the Fourteenth Amendment, "the Eleventh Amendment and associated principles of sovereign immunity block private litigation against states in federal court" under the act. In Stevens, 210 F.3d at 741, the court reiterated that "[s]tates are entitled to Eleventh

Amendment immunity for suits brought by individuals under the ADA" in federal court. In addition to state agencies, a plaintiff cannot sue individual state actors under the ADA in federal court. EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995) ("individuals who do not otherwise meet the statutory definition of 'employer' cannot be liable under the ADA").

Plaintiff alleges that defendants are liable for violating his rights protected by the ADA by failing to provide him with programs, services and activities. This claim is barred by the holdings in Erickson, Stevens and AIC Security. Accordingly, plaintiff will not be allowed to proceed on his ADA claim because he has sued individuals who are not suable in federal court under the Act.

With respect to plaintiff's remaining claims, I understand him to be alleging that 1) defendant Norm Polinske, a program review coordinator at the Waupun Correctional Institution, was deliberately indifferent to plaintiff's serious medical needs when he reclassified plaintiff to be sent to a Tennessee prison and forced him to spend 14 hours on a bus in shackles and chains; 2) defendant Corrections Corporation of America was deliberately indifferent to plaintiff's serious medical needs by refusing for fourteen months to provide him with a cane, a second mattress and a chair in his cell and by refusing to allow him to have hip replacement surgery; 3) defendant Phil Kingston a) was deliberately indifferent to plaintiff's serious medical needs by failing to arrange for plaintiff to have an

orthopedic consultation at the University of Wisconsin hospital, and b) deprived plaintiff of his collector's edition of a Bible and 12 Northwest Reporters without due process in violation of plaintiff's Fourteenth Amendment rights; 4) defendant Carole Wetzel took delight in plaintiff's pain and poor health in violation of plaintiff's Eighth Amendment rights; 5) defendant Jane Sondalle retaliated against plaintiff for complaining about Wetzel's conduct by directing staff to harass plaintiff and to refuse him assistance in moving about the prison and by arranging with Dr. Kaplan to require plaintiff to use the Health Services Unit showers instead of a shower on the unit; 6) defendant Dr. Roman Kaplan was deliberately indifferent to plaintiff's serious medical needs when he discontinued plaintiff's medication and allowed him to have it only if he paid $7.50; 7) defendant Sgt. Daken retaliated against plaintiff for complaining about his placement in a handicap cell by refusing to retrieve a shower chair for plaintiff; 8) defendant Robin Boyd was deliberately indifferent to plaintiff's serious medical needs when she refused to allow him to have an aide before mid-March, 2003; 9) "Stanley Correctional Institution employees" retaliated against plaintiff for filing a variety of grievances about the institution's failure to meet his special needs by denying him job opportunities; and 10) defendants Judy Smith and Matthew Frank violated plaintiff's constitutional rights by dismissing or refusing to respond to plaintiff's inmate complaints.

A. Denial of Medical Care

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. In 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 v. Peters, 111 F.3d at 1364, 1371, 1373 (7th Cir. 1997)("'serious' medical need is one that has been diagnosed by a physician as mandating treatment").

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. 824, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91; Franzen, 780 F.2d at 652-53.

Deliberate indifference in the denial or delay of medical care can be shown by a defendant's actual intent or reckless disregard. Actual intent might be inferred when the denial of medical treatment is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition," Snipes, 95 F. 3d at 592. Reckless disregard is 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).

The only allegations against defendant Norm Polinske are that he approved plaintiff's transfer to Tennessee even though he knew that plaintiff had bilateral hip osteoarthritis, and that during the transfer plaintiff stiffened up so severely that he had to be carried off the bus. According to plaintiff's own allegations, at the time the committee made its recommendation for transfer, defendant Polinske and the other members of the program review committee believed plaintiff would be provided 24-hour medical care at the Tennessee facility. Plaintiff has not alleged any facts from which an inference may be drawn that defendant Polinske knew that plaintiff would not get adequate treatment at the facility. Moreover, although plaintiff was required to sit for an extended period of time during the transfer, he does not allege that defendant Polinske interfered with his ability to take his medication during the transfer or to stand and move around periodically. Plaintiff's claim against defendant Polinske will be dismissed for failure to state a claim upon which relief may be granted.

Plaintiff alleges that defendant Corrections Corporation of America's policy was to deprive inmates of their canes and to refuse to provide them with a second mattress and a chair. He alleges that it took the corporation more than a year to send him to an orthopedic surgeon and that although it provided him with a wheelchair and double mattress upon the surgeon's recommendation, it refused to arrange for his hip replacement surgery.

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that he was deprived of a constitutional right and that a person acting under color of state law deprived him of such right. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Courts have determined that defendant Corrections Corporation of America and its employees are "state actors" under § 1983. Street v. Corrections Corp. of America, 102 F.3d 810, 814 (6th Cir. 1996) (firm operating prison is state actor because firm performed "traditional state function" of operating a prison); Giron v. Corrections Corp. of America, 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998) (privately employed correction officer is state actor because he performed state function of incarcerating citizen). In alleging that it is defendant Corrections Corporation of America's policy to deny prisoners their canes, double mattresses and a chair, and to refuse to arrange for surgery despite a surgeon's assessment that surgery is necessary, plaintiff has stated a claim of deliberate indifference against the corporation. Accordingly, plaintiff may proceed on this claim.

Plaintiff alleges that after he was transferred to the Columbia Correctional Institution,

the institution received a class III request for authorization of services for plaintiff to have an orthopedic consultation at the University of Wisconsin hospital and that he did not have such a consultation. This allegation is insufficient to state a claim of deliberate indifference to a serious medical need against defendant Phil Kingston, the warden of the institution. By itself, the failure to implement a particular diagnostic technique or approve a request for authorization of services does not state a claim under the Eighth Amendment. Estelle, 429 U.S. at 107 (where medical personnel saw inmate 17 times in 3 months and treated back strain with bed rest, muscle relaxants and pain relievers, their failure to x-ray his broken back or implement other diagnostic techniques or treatment was not deliberate indifference); Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508 (7th Cir. 1999). Plaintiff does not allege that he received no medical treatment at all for his condition while he was confined at the Columbia Correctional Institution. Moreover, I am aware from at least one other case filed in this court, Lindell v. Daley, 02-C-459-C (W.D. Wis. Nov. 21, 2001) that in 2001 it was the Director of the Bureau of Health Services to whom requests for Class III medical procedures were submitted and it was the director who had the authority to grant or deny the requests.

To recover damages under §1983, a plaintiff must establish each defendant's personal responsibility for the claimed deprivation of a constitutional right. Plaintiff does not allege any facts suggesting that defendant Kingston participated directly in disapproving the Class

III request for a consultation or even that he was aware of the request. In order for a supervisory official to be found liable under §1983, there must be a "causal connection, or an affirmative link, between the misconduct complained of and the official sued." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). The doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Therefore, plaintiff's claim of denial of medical care against defendant Kingston will be dismissed.

Plaintiff appears to be alleging that defendant Dr. Kaplan violated his Eighth Amendment rights because in April 2002, Kaplan discontinued a medication that plaintiff had been taking for 10 or 11 years and that the only way plaintiff could get that particular medication was to pay $7.50. Plaintiff does not allege any facts suggesting that the decision to discontinue the medication was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition," Snipes, 95 F. 3d at 592, or was highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger was readily apparent. Indeed, plaintiff does not allege any ill effect from having the medication discontinued other than that he had to pay to receive it. Plaintiff does not allege that he could not afford to pay the $7.50 or even that defendant Kaplan failed to offer him alternative treatment. Accordingly, plaintiff will not be allowed

to proceed on his claim against defendant Dr. Kaplan.

Plaintiff alleges that defendant Robin Boyd was deliberately indifferent to his serious medical needs when she responded to his February 5 grievance by saying that he did not need an aide and then by failing to arrange for an aide until mid-March, 2003. Even liberally construing plaintiff's allegations, I conclude that a delay in obtaining the services of an aide for six weeks under the circumstances alleged in this case does not rise to the level of an Eighth Amendment violation. Plaintiff does not allege that he was incapable of attending to his own needs in the time it took defendant Boyd to hire an aide to work on plaintiff's wing. In the absence of allegations suggesting that the delay was blatantly inappropriate or highly unreasonable given the degree of danger not having an aide posed for plaintiff, plaintiff's deliberate indifference claim against defendant Boyd is legally meritless.

Denial of Property

Plaintiff alleges that when he arrived at the Columbia Correctional Institution in March, 2001, his collector's edition of a Bible and 12 Northwest Reporters were missing. He alleges that as a result of these losses, he suffers emotional and mental distress. Although plaintiff does not name any defendant as having been personally involved in taking his property, for the purpose of this order I will assume that plaintiff is bringing this claim against defendant Phil Kingston, a high official at the Columbia Correctional Institution who

may be able to identify mail room personnel who may have lost or intentionally taken plaintiff's books.

The Prison Litigation Reform Act prevents prisoners from bringing claims for mental or emotional injury without a showing of physical injury. See 42 U.S.C. § 1997e(e). Plaintiff has not alleged that he suffered physical injury as a result of the loss of his property. Moreover, plaintiff fails to state a claim upon which relief may be granted to the extent that he may be seeking money damages for the taking of his property without due process of law. As long as state remedies are available, neither intentional nor negligent deprivation of property gives rise to a constitutional claim. Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). In Hudson, the United States Supreme Court held that an inmate has no due process claim for the intentional deprivation of property if the state has made available to him a suitable post-deprivation remedy. In Daniels, the Court concluded that a due process claim does not arise from a state official's negligent act that causes unintended loss of or injury to property.

The State of Wisconsin provides several post- deprivation procedures for challenging the taking of property. Sections 810 and 893 of the Wisconsin Statutes provide plaintiff with replevin and tort remedies. Section 810.01 provides a remedy for the retrieval of wrongfully taken or detained property. Section 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the

recovery of the property. Because the state has not refused to provide plaintiff with a post-deprivation remedy, the existence of these remedies defeats any claim plaintiff might have that defendants deprived him of his property without due process of law. Accordingly, plaintiff will not be allowed to proceed on his claim that he was deprived of his Fourteenth Amendment rights when his collector's edition Bible and Northwest Reporters were lost or taken at the time of his transfer to Columbia Correctional Institution.

B. Retaliation

Plaintiff alleges that unnamed employees at the Stanley Correctional Institution denied him job opportunities in retaliation for his filing grievances about his cell assignment, defendant Daken's refusal to retrieve the shower chair, his inability to be assigned an aide, his inability to participate in recreational activities and other services and programs because of his wheelchair, and "blanket discriminatory practices" at the institution. He alleges that defendant Daken refused to retrieve a shower chair for him in retaliation for his complaining about being moved back into a handicap cell. Finally, he alleges that defendant Sondalle ordered staff to harass him, deny him showers on the unit and deny him an aide to push his wheelchair because plaintiff pursued a complaint against defendant Carol Wetzel.

To state a claim for retaliation, plaintiff need only identify the retaliatory act of the defendant and the constitutionally protected behavior that prompted the retaliation. Higgs

v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). Plaintiff has done this with respect to his claims against defendants Sondalle and Daken. Also, although plaintiff does not appear to know the names of the employees at Stanley Correctional Institution who denied him job opportunities because of his complaints, I will allow him to proceed on this retaliation claim against defendant Daniel Benik, the warden of the institution. However, Benik will stay in this lawsuit only until plaintiff conducts formal discovery to uncover the names of the persons directly responsible for denying him job opportunities. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (pro se complaint should not suffer dismissal of a defendant high official for lack of personal involvement when claim involves conditions or practices which, if they existed, would likely be known to higher officials or if plaintiff is unlikely to know the person or persons directly responsible absent formal discovery). If plaintiff is to have any chance of ultimate success on this claim, he will have to amend his complaint to name the specific individuals involved. Early in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff is to amend his complaint to name them.

C. Race Discrimination

Plaintiff alleges that when he arrived at the Stanley Correctional Institution, the two white inmates in wheelchairs were given aides, because he is black, he did not get an aide. Racism in any form is reprehensible. Although prisoners are expected to endure many "harsh" and "restrictive" conditions as "part of the penalty . . . for their offenses," Rhodes v. Chapman, 452 U.S. 337, 347(1981), they should not be expected to endure bigotry and intolerance. See Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y.1991) ("Racism is never justified; it is no less inexcusable and indefensible merely because it occurs inside the prison gates."). The equal protection clause of the Fifth and Fourteenth Amendments prohibits government actors from applying different legal standards to similarly situated individuals. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Discriminatory intent may be established by showing an unequal application of a prison policy or system, but conclusory allegations of racism are insufficient. Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir.1986).

Although plaintiff does not identify any defendant who made the immediate decision to offer aides to the white inmates but refuse him an aide, plaintiff's allegations of retaliatory conduct against defendant Jane Sondalle suggests that she is the person with authority to assign plaintiff an aide or deny him such assistance. Therefore, I will allow plaintiff to proceed on his race discrimination claim against defendant Sondalle.

D. Miscellaneous Claims

Plaintiff alleges that defendant Judy Smith dismissed plaintiff's grievance about Officer Preice's alleged attempt to convince plaintiff to drop his complaint against defendant Wetzel under the threat of being charged with lying about staff. He alleges that defendant Frank has not responded to his complaints about retaliation and denial of medical care.

The right to petition the government for redress of grievances does not guarantee a favorable response, or indeed any response, from government officials. The First Amendment's right to redress of grievances is satisfied by the availability of a judicial remedy, Azeez v. DeRobertis, 568 F.Supp. 8, 10 (N.D. Ill.1982), and the Constitution does not require a prison grievance system. Mann v. Adams, 855 F.2d 639, 640 (9th Cir.) (Fourteenth Amendment does not protect state-created inmate grievance procedures, and alleged violations of these grievance procedures do not state a claim under § 1983). Therefore, plaintiff's claims against defendants Smith and Frank will be dismissed.

Finally, plaintiff alleges that defendant Carole Wetzel took delight in plaintiff's pain and poor health and made comments such as, "Don't you think you deserve that?" or words to that effect. She told plaintiff he deserved to be in a wheelchair because of his crimes. Assuming defendant Wetzel made the comments plaintiff accuses her of making, her words reveal a lack of professionalism. However, lack of professionalism is not a behavior that is forbidden under the Constitution. Accordingly, plaintiff's claim against defendant Wetzel

will be dismissed.

ORDER

IT IS ORDERED that

1. Plaintiff may proceed on his claim against defendant Corrections Corporation of America that its policy of denying him a cane, double mattresses and a chair and its refusal to arrange for hip replacement surgery deprived plaintiff of his Eighth Amendment rights.

2. Plaintiff may proceed on his claim against defendant Jane Sondalle that she retaliated against plaintiff for exercising his First Amendment right to file a grievance by directing staff to harass plaintiff and refuse him assistance in moving about the prison by arranging for him to have to go to the Health Services unit to shower. Also, plaintiff may proceed on his claim that defendant Sondalle discriminated against plaintiff because of his race by not assigning him an aide after his arrival at Stanley Correctional Institution.

3. Plaintiff may proceed on his claim against Sgt. Daken that he retaliated against plaintiff for exercising his First Amendment right to file a grievance by refusing to retrieve a shower chair for plaintiff.

4. Plaintiff may proceed against defendant Daniel Benik on his claim Stanley Correctional Institution employees retaliated against him for exercising his First Amendment right to file grievances by denying him job opportunities. Plaintiff is proceeding against

Benik for the sole purpose of conducting discovery to learn the names of the individuals personally involved in the retaliatory acts, who must then be named and served with an amended complaint.

Further, IT IS ORDERED that

5. Plaintiff's claims brought under the Americans With Disabilities Act are DISMISSED.

6. Plaintiff's claim that defendant Norm Polinske violated his Eighth Amendment rights by recommending his transfer to Tennessee and requiring him to sit on a bus for 14 hours is DISMISSED.

7. Plaintiff's claims that defendant Phil Kingston violated his Eighth Amendment rights by not arranging an orthopedic consultation and his Fourteenth Amendment rights by depriving him of property without due process are DISMISSED.

8. Plaintiff's claim that defendant Dr. Roman Kaplan violated his Eighth Amendment rights by discontinuing his medication and requiring plaintiff to pay $7.50 is DISMISSED.

9. Plaintiff's claim that defendant Robin Boyd violated his Eighth Amendment rights by refusing for six weeks to provide him with an aide is DISMISSED.

10. Plaintiff's claim that defendant Carole Wetzel violated his Eighth Amendment rights by expressing delight in plaintiff's pain is DISMISSED.

11. Plaintiff's claim that defendants Judy Smith and Matthew Frank violated his

constitutional rights by dismissing or failing to respond to his inmate grievances are DISMISSED.

12. Defendants Norm Polinske, Phil Kingston, Roman Kaplan, Robin Boyd, Carole Wetzel, Judy Smith and Matthew Frank are DISMISSED from this lawsuit.

Finally, IT IS ORDERED that defendants Corrections Corporation of America, Jane Sondalle, Daniel Benik and Sgt. Daken may have twenty days from the date of service of this order in which to serve and file a response to plaintiff's complaint.

Entered this 30th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge