IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE C. SIMPSON,

Petitioner, ORDER

v. 04-C-29-C

S. WALL, W. MAAS, and MURPHY,
Milwaukee County Sheriff's Deputies;
TIMOTHY DOUMA, Security Director; and
ANTHONY ASHWORTH, Security Supervisor,

Respondents.,

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This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Columbia Correctional Institution in Portage, 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. See 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); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

I conclude from petitioner's allegations that respondents acted reasonably when petitioner asked whether he could use a restroom and that they allowed him to shower immediately upon arriving at the Milwaukee County Jail. Because respondents acted reasonably, petitioner cannot succeed on a claim that they were deliberately indifferent to his needs in violation of the Eighth Amendment. Therefore, I will deny petitioner's request for leave to proceed in forma pauperis and dismiss this case as without legal merit.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is an inmate at Columbia Correctional Institution in Portage, Wisconsin. Respondents S. Wall and W. Maas are Deputy Sheriffs for Milwaukee County.

On October 13, 2003, around 4:30 p.m., respondents Wall and Maas picked up petitioner at Columbia Correctional Institution for transportation to a court appearance petitioner had in Milwaukee County. Respondents restrained petitioner's legs and arms with shackles and handcuffs and placed a chain around his waist. On the way to Milwaukee County, respondents stopped their van at the Mendota Juvenile Treatment Center to pick up additional prisoners for the trip. Upon arriving at the treatment center, petitioner advised respondent Wall that he had to use the restroom. Respondent Wall denied the request. Respondent Maas then went inside the center to retrieve an additional prisoner. Petitioner repeated his request to use the restroom, stating that his stomach was "messed up" and that he could no longer hold it, to which respondent Wall stated, "No, because this is a juvenile center." Petitioner asked Wall to ask someone in the center to allow him to use the restroom and Wall replied, "No."

After fifteen minutes had passed, during all of which petitioner pleaded to use the restroom, respondent Maas returned with the prisoner and secured him in the van. Respondents drove around to the other side of the building to retrieve another prisoner. Petitioner asked again to use the restroom. Wall replied, "No." Petitioner stated that he

could not hold it, but if respondents would stop somewhere, he would try to hold it. Wall stated that the van was not stopping anywhere. Respondent Maas went inside the building to retrieve the other prisoner. Petitioner sat for another 15 to 20 minutes. At that point petitioner said to respondent Wall that if he didn't allow him to use the restroom, he would unwillingly defecate on himself. Respondent Wall stated, "Well, do what you got to do."

Petitioner began to cry because his stomach hurt and then he urinated and defecated on himself. Respondent Maas returned to the van and told respondent Wall that the center authorized petitioner's use of the restroom. Wall responded, "Oh well, too late."

After securing the second prisoner in the van, the respondents drove 60 to 80 minutes to Milwaukee. Petitioner took some paper from his folder and put it in his pants to keep from sitting in his feces. However, the feces soaked through the paper to his underwear and stuck to his buttocks. Petitioner sat in his feces for the duration of the trip. The stench was so strong that the female passenger vomited. Petitioner almost vomited. No windows were open in the back of the van where petitioner and the other passengers were. The eight other passengers in the van made fun of him.

When the van finally arrived at the Milwaukee County Jail, petitioner was greeted by other deputies who laughed at him and joked about what had happened. Petitioner was taken to a change over room and given a shower. Petitioner vomited in the shower because the stench from his feces after sitting in them for 80 miles and swallowing his vomit had

made him sick. Petitioner was mentally drained, embarrassed and humiliated because of the ordeal.

After appearing in court, petitioner was transported back to Columbia Correctional Institution. On October 19, 2003, petitioner submitted a Milwaukee County Jail inmate grievance condemning respondents' actions and requesting that the matter be settled for $10,000 in punitive damages and $15,000 in compensatory damages. The sheriff's department, internal affairs division, responded on November 13, 2003, blaming petitioner for defecating himself, accusing him of enjoying the act of defecating himself and excusing respondents' actions stating that they had no other alternative. An investigation has ended the grievance process.

DISCUSSION

As an initial matter I note that petitioner has moved to dismiss voluntarily respondents Murphy, Timothy Douma and Anthony Ashworth. I will grant petitioner's motion and will focus on his claim against respondents Wall and Maas.

In order to state a claim under the Eighth Amendment, petitioner's allegations about prison conditions must satisfy a test that involves both an objective and subjective component. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). He must allege that the conditions to which he was subjected were "sufficiently serious" (objective component) and

that defendants were deliberately indifferent to his health or safety (subjective component). Id. Conditions of confinement that deprive prisoners of the "minimal civilized measure of life's necessities" satisfy the objective component of the Eighth Amendment inquiry. Id., 511 U.S. at 834 (citations omitted). The Eighth Amendment protects individuals against both harm that is occurring and against "conditions posing a substantial risk of serious harm" if allowed to continue. Id.

As for the subjective component of the Eighth Amendment test, 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." Id. at 837. If the circumstances suggest that the prison officials were exposed to information about the risk and thus must have known about it, that evidence could be sufficient to allow a trier of fact to find actual knowledge. Id. at 842-43. The officials can still show that they were unaware of the risk or that they were aware of the risk and took reasonable steps to prevent the risk of harm. Id. at 844-45.

Petitioner alleges that when respondents refused to allow him to use the restroom in the juvenile facility when he asked to do so, respondents created an unsanitary and unbearable situation. Petitioner argues that respondents should have at the very least allowed him to clean himself up after he had defecated on himself. Instead, respondents drove to Milwaukee, subjecting him to embarrassment. However, petitioner alleges also that

respondent Maas asked the juvenile treatment center whether petitioner could use the restroom. By the time respondent Maas advised respondent Wall that the center had given its permission for petitioner to use the restroom, petitioner had already soiled himself.

Respondents acted reasonably when they initially declined to allow petitioner out of the van during transportation and when they attempted to make special arrangements for petitioner to use the restroom at the juvenile facility. The fact that permission came too late is not dispositive.

Sitting in one's own feces for sixty to eighty miles cannot be said to present a risk of serious harm. In several cases involving challenges to unsanitary conditions in prisons, the court of appeals has relied heavily on the length of time that a prisoner was subjected to allegedly unsanitary conditions. E.g., Sanders v. Sheahan, 198 F.3d 626, 629 (7th Cir. 1999) (providing one bar of soap, sample size of toothpaste and no means to launder clothes for eight months states claim under Eighth Amendment); Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996) (sixteen month infestation of cockroaches and mice sufficient to state a claim); Lunsford v. Bennett, 17 F.3d 1574 (7th Cir. 1994) (denial of hygiene items for 24 hours did not violate Eighth Amendment). Even if sitting in one's feces for an hour and a half could be said to present a risk of serious harm, transporting prisoners presents high security risks for officers. It was reasonable for respondents to wait until arriving at the Milwaukee County jail before allowing petitioner to clean himself. Petitioner alleges that

as soon as he arrived at the jail, he was able to take a shower and change into new clothes. Respondents took reasonable steps to prevent a risk of serious harm to petitioner and responded to the situation as soon as it was feasible to do so. As a result, I cannot find that respondents were deliberately indifferent to petitioner's health or safety.

ORDER

IT IS ORDERED that

1. Petitioner Willie C. Simpson's motion to dismiss voluntarily respondents Murphy, Timothy Douma and Anthony Ashworth is GRANTED;

2. Petitioner's request for leave to proceed in forma pauperis on his Eighth Amendment claim against respondents Wall and Maas is DENIED and this case is DISMISSED with prejudice because the claims in the complaint are legally meritless;

4. The unpaid balance of petitioner's filing fee is $ 147.89; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

5. A strike will be recorded against petitioner pursuant to § 1915(g); and

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

Entered this 29th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge