IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM FAULKNER, #244067,

Plaintiff, ORDER

v. 04-C-408-C

JON LITSCHNER, Former Sec. WI. D.O.C.;
DANIEL BENICK, Former Warden, C.C.I.;
MIKE MARSHALL, Social Worker, C.C.I.;
DR. BRIDGEWATER, M.D., C.C.I.;
MIKE HOLM, Warden, Whiteville Correctional Facility;
MR. JONES, Unit Manager, Whiteville;
CORRECTIONAL CORPORATION OF AMERICA,
ALL UNNAMED WHITEVILLE STAFF;
ALL UNNAMED WHITEVILLE SECURITY PERSONAL/DIRECTORS; and
ALL WI D.O.C. PERSONAL AFFILIATED WITH THE TRANSFER OF INMATES,

Defendants.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner William Faulkner, an inmate at the Stanley Correctional Institution in Stanley, Wisconsin, alleges that respondents subjected him to an unreasonable risk of serious harm by housing him in a cell with a smoker, in violation of the

Eighth Amendment.

Although petitioner has paid the filing fee in full, because he is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must construe the complaint liberally. 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, on three or more previous occasions, the prisoner has had a suit 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 seeks money damages from a defendant who is immune from such relief.

I conclude that petitioner has stated a claim upon which relief may be granted with respect to his claim against respondent Jones, the only respondent that petitioner alleges was personally involved in refusing to transfer petitioner to a smoke free cell. The remaining respondents will be dismissed.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner William Faulkner is an inmate at the Stanley Correctional Institution in Stanley, Wisconsin. Formerly, petitioner was incarcerated at the Whiteville Correctional

Facility in Whiteville, Tennessee. Respondent Mike Holm was the acting warden of the Whiteville Correctional Facility in Whiteville, Tennessee. Respondent Jones was the unit manager of F-Unit at the Whiteville prison.

Respondent Jon "Litschner" (properly, Litscher) was Secretary of the Wisconsin Department of Corrections. He was "ultimately responsible" for petitioner's transfer to Whiteville. Respondent Daniel Benick was the warden of Columbia Correctional Institution. Respondent Bridgewater was a doctor at Columbia. Respondent Mike Marshall was petitioner's social worker at Columbia. Both Bridgewater and Marshall approved petitioner's transfer to Whiteville.

Petitioner has a number of medical conditions, including diabetes and cardiac and respiratory problems. Despite petitioner's poor health, he was celled with a smoker in the Whiteville prison. Petitioner complained to respondent Jones multiple times, but each time Jones refused to move him, even though several empty cells were available.

After a month and a half passed by, petitioner spoke with the prison doctor, who told him that his lungs were filling up with fluid as a result of second hand smoke. It was the doctor's medical opinion that petitioner should be transferred immediately to a smoke free environment. Petitioner remained celled with a smoker until he was transferred out of the prison.

OPINION

I understand petitioner to contend that respondents violated his right to be free from cruel and unusual punishment by housing him in a cell with a smoker. In Helling v. McKinney, 509 U.S. 25 (1993), the Supreme Court held that a prison inmate could state a claim under the Eighth Amendment for involuntary exposure to environmental tobacco smoke. However, the Court did not recognize an absolute right to a smoke-free environment. Rather, the Court held, the plaintiff must satisfy a two-part test to succeed on an Eighth Amendment claim involving environmental tobacco smoke. First, there is an objective component in which the plaintiff must show that he is "being exposed to unreasonably high levels of [environmental tobacco smoke]." Id. at 35. An unreasonably high level is one that "pose[s] an unreasonable risk of serious damage to his [current or] future health." Id.

Second, the plaintiff must prove that the defendants exposed him to second hand smoke with "deliberate indifference" to his health or safety. Id. A prison official acts with deliberate indifference when she "knows of and disregards an excessive risk to inmate health or 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." Farmer v. Brennan, 511 U.S. 825, 837 (1994).

Petitioner has alleged that he suffered from heart and lung conditions that made him

more vulnerable to second hand smoke and that a doctor told him that he needed a smoke-free environment. This is sufficient at this stage of the proceedings to satisfy the objective part of the test. Lehn v. Holmes, 364 F.3d 862 (7th Cir. 2004) (prisoner stated claim under Eighth Amendment by alleging that he was being "exposed to intolerable levels of" second hand smoke); Alvarado v. Litscher, 267 F.3d 648 (7th Cir. 2001) (prisoner stated claim under Eighth Amendment when he alleged that he had "chronic, severe asthma from childhood, which was worsened by" environmental tobacco smoke"). Further, although any claim for injunctive relief may be moot because petitioner has been transferred out of Whiteville, he may still recover for any injuries he has already sustained or for increased risks of future injuries caused by the exposure to environmental tobacco smoke. Henderson v. Sheahan, 196 F.3d 839, 848 n.3, 851 (7th Cir. 1999). Although case law has not addressed this issue directly, there is a possibility that petitioner could recover punitive damages for being subjected to a substantial risk of serious harm even if that harm did not come to pass.

Petitioner is advised, however, that in the later stages of the litigation, he will not be able to rely solely on allegations. The Federal Reporter is replete with cases in which claims similar to petitioner's were dismissed at the summary judgment stage because the inmate did not have sufficient evidence showing either that he had been significantly injured by second hand smoke or that he faced a substantial risk of serious injury in the future. E.g., Oliver v. Deen, 77 F.3d 156 (7th Cir. 1996) (no Eighth Amendment violation for celling asthmatic

with smoker when only evidence showed that inmate's case of asthma was "mild" and doctor did not "order" inmate to be housed with nonsmokers only); Goffman v. Gross, 59 F.3d 668 (7th Cir. 1995) (affirming dismissal of second hand smoke claim of inmate who had recovered from lung cancer when only medical evidence in record supported view that inmate was not especially vulnerable); see also Scott v. District of Columbia, 139 F.3d 940 (D.C. Cir. 1998) (summary judgment for defendants affirmed on second hand smoke claim when inmate failed to adduce evidence of amount of smoke to which he was exposed or causal connection between symptoms and exposure).

Thus, to survive a motion for summary judgment, petitioner will have to adduce evidence that the amount of smoke to which he was exposed was high enough to pose a substantial risk of serious harm to his current or future health. Further, to the extent that petitioner wishes to rely on the opinion of the doctor who examined him at Whiteville, he will have to either depose him or obtain an affidavit from him. Under the Federal Rules of Evidence, parties may not establish a fact through testimony of what another person told them. Fed. R. Evid. 801-02 (rule against hearsay); Fed. R. Civ. P. 56(e) (evidence must be made on personal knowledge). If petitioner cannot locate the doctor, he will have to obtain other evidence of a medical expert who can testify to a reasonable certainty that petitioner's exposure to second hand smoke at Whiteville subjected him to a substantial risk of serious harm. Henderson, 196 F.3d at 851-53.

With respect to the requirement to show "deliberate indifference," petitioner has alleged that he complained repeatedly to respondent Jones about the second hand smoke, but Jones did nothing to help petitioner. This is sufficient to state a claim against respondent Jones. However, in future stages of the proceedings, petitioner will have to show that Jones *knew* that petitioner was at serious risk of injury but he intentionally or recklessly disregarded that risk. In addition, I note that although it is likely that Jones is an employee of the Corrections Corporation rather than the state of Tennessee, he may still have been acting "under color of law" for the purpose of liability under § 1983 because he was performing a traditional public function. Giron v. Corrections Corporation of America, 14 F. Supp. 2d 1245 (D.N.M. 1998).

Petitioner has not stated a claim against any of the other respondents. Petitioner appears to have named Mike Holm as a respondent for the sole reason that he was warden of Whiteville and Corrections Corporation of America simply because it owned the prison in which he was incarcerated. However, to impose liability on a defendant under 42 U.S.C. § 1983, a plaintiff must show that each defendant was *personally* responsible for the alleged constitutional violation. In other words, a plaintiff must show that each defendant knew about the alleged violation and facilitated it, approved it, condoned it or turned a blind eye for fear of what he might see. Morfin v. City of Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). A defendant cannot be held liable simply because he is the supervisor of someone

else who committed an unconstitutional act. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Accordingly, respondent Holm must be dismissed, along with the Corrections Corporation. Although courts have held that the private prisons may be sued under § 1983, Street v. Corrections Corp. of America, 102 F.3d 810, 814 (6th Cir. 1996), entities cannot be held liable unless a policy of the entity is a "moving force" behind the constitutional violation. White v. City of Markham, 310 F.3d 989, 998 (7th Cir. 2002). Petitioner has not alleged that Corrections Corporation had a policy or custom of placing smokers in the same cell as nonsmokers who are vulnerable to second hand smoke.

The remaining named respondents are employees of the Wisconsin Department of Corrections. Apparently, petitioner blames them because they allowed his transfer to Whiteville. This sort of attenuated theory of causation has no place in § 1983 litigation. Petitioner does not allege that the respondents from Wisconsin had any reason to believe that he would be subjected to an unreasonable level of second hand smoke after he was transferred. Prison officials cannot be held liable for conditions of which they are not even aware. Accordingly, I will dismiss respondents Litscher, Benick, Marshall, Bridgewater and the "unnamed" staff from Whiteville and the Wisconsin Department of Corrections.

I note two final issues. First, the sole remaining defendant is a resident of Tennessee. Under 28 U.S.C. § 1391(b), a civil rights action "may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside

in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." Venue is improper under § 1391(b)(1) because, with the dismissal of all respondents except Jones, no respondent resides in Wisconsin. None of the events giving rise to the claim occurred in Wisconsin. Because no exception to § 1391(b) applies, the Western District of Wisconsin is an improper venue for this case. However, because improper venue may be waived, Moore v. Olsen, 368 F.3d 757, 759 (7th Cir. 2004), I will not transfer the case under 28 U.S.C. § 1404 at this time.

Second, because petitioner's alleged injury occurred in Tennessee, it is that state's statute of limitations for tort actions that would apply, which is only one year. Brademas v. Indiana Housing Finance Authority, 354 F.3d 681, 685 (7th Cir. 2004); Jackson v. Richards Medical Co., 961 F.2d 575, 578 (6th Cir. 1992). Petitioner does not identify the period during which he was incarcerated at Whiteville, but he alleges he has been transferred to two other states since then. Petitioner's action may be subject to dismissal if respondent Jones can prove that petitioner's injuries occurred more than one year ago.

The next step is for petitioner to serve his complaint on respondent. Under Fed. R. Civ. P. 4(m), a plaintiff has 120 days after filing a complaint in which to serve the defendant. However, that is an outside limit with few exceptions. This court requires that

a plaintiff act diligently in moving her case to resolution. If petitioner acts promptly, he should be able to serve his complaint on the respondent well before the deadline for doing so established in Rule 4.

To help petitioner understand the procedure for serving a complaint on an indiviudal, I am enclosing with this memorandum a copy of a document titled "Procedure for Serving a Complaint on Individuals in a Federal Lawsuit." In addition, I am enclosing to petitioner an extra copy of his complaint and forms he will need to send to the defendant in accordance with the procedures set out in Option 1 of the memorandum.

ORDER

IT IS ORDERED that

1. Petitioner William Faulkner is GRANTED leave to proceed under 28 U.S.C. § 1915 on his claim that respondent Jones failed to protect him from second hand smoke, in violation of petitioner's right to be free from cruel and unusual punishment.

2. Petitioner is DENIED leave to proceed on his claim against respondents Jon Litschner, Daniel Benick, Mike Marshall, Dr. Bridgewater, Mike Holm, Correctional Corporation of America, "All unnamed Whiteville staff," "All unnamed Whiteville security personal/directors," and "All WI D.O.C. personal affiliated with the transfer of inmates." These respondents are DISMISSED from this action.

3. Petitioner is directed to promptly serve his complaint on respondent Jones and file proof of service of his complaint as soon as service has been accomplished. If, by October 1, 2004, petitioner fails to submit proof of service of his complaint on the respondent or explain his inability to do so, I will direct petitioner to show cause why his case should not be dismissed for lack of prosecution.

5. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to respondent or to respondent's attorney.

6. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 23rd day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge

PROCEDURE FOR SERVING A COMPLAINT ON A STATE OFFICIAL
IN A FEDERAL LAWSUIT

A plaintiff who is allowed to proceed in an action under 28 U.S.C. § 1915A against state officials may satisfy the service requirements of Fed. R. Civ. P. 4 by following one of two procedures.

Option One

Plaintiff may notify each defendant in writing of the filing of his lawsuit and request that the defendant waive service of a summons. Fed. R. Civ. P. 4(d)(2). If plaintiff chooses this method of service, he must

- complete for each defendant an original and one copy of a form titled "Notice of Lawsuit and Request for Waiver of Service of Summons" (blank notice forms are attached to this document);
- address a large envelope to each defendant and place the following documents inside:
  a) an original and one copy of the completed notice form;
  b) a blank form titled "Waiver of Service of Summons" (also attached to this order);
  3) a copy of his complaint; and
  4) a self-addressed, stamped envelope for the defendant's use in returning the waiver form to him;
- mail the envelope to each defendant by first-class mail or other reliable means;
- allow the defendants "a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent . . . ." (Fed. R. Civ. P. 4(d)(2)(F)).
- mail a copy of the signed waiver forms to the court for filing as proof of service.

Option Two

Note well: This procedure need not be followed unless a defendant refuses to complete and return a waiver form as described above.

Plaintiff may arrange to serve each defendant personally with a summons and complaint. If plaintiff chooses this method of service, he must

- complete a summons form for each defendant (summons forms are available on request from the clerk of court);
- present the completed summons forms to the clerk of this court to obtain his signature and an imprint of the court's seal;
- arrange for someone over the age of 18 years of age who is not a party to the lawsuit to
  1) deliver the signed and sealed summons and a copy of the complaint to each defendant personally; or
  2) leave the summons and complaint at the defendant's house with a person of suitable age and discretion who lives there with the defendant; or
  3) deliver the summons and complaint to an agent authorized by appointment or by law to receive service of process on the defendant's behalf.
- file with the court an affidavit of the person who effected service of the summons and complaint upon the defendants stating the time and date the delivery was made and with whom the summons and complaint was left, or showing a receipt signed by the defendant or other evidence of delivery. Fed. R. Civ. P. 4(l).