IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSEPH WEHRHAHN,

ORDER

Petitioner,

04-C-475-C

v.

MATTHEW FRANK,
RICHARD VERHAGEN
and GERALD BERGE,

Respondents.

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Plaintiff has been granted leave to proceed in forma pauperis in this action on his claims that 1) in late December 2003, while he was an inmate at the Prairie du Chien Correctional Institution, a corrections official refused to allow plaintiff to see an orthopedist doctor despite his having been diagnosed as requiring treatment from an orthopedist; 2) between December 23, 2003 and January 15, 2004, a corrections officer refused to allow plaintiff to wear a prescribed knee sleeve in segregation; and 3) in March, 2004, after plaintiff had been transferred to the Wisconsin Secure Program Facility where he is presently confined, a prison official removed from his cell door a medical restriction tag against kneeling. With the removal of the tag, plaintiff had to kneel to be shackled for the next two

weeks each time he left his cell.

However, because plaintiff conceded in his complaint that defendants Frank, Verhagen and Berge were not personally involved in the acts giving rise to his Eighth Amendment claims, I denied plaintiff leave to proceed against these named defendants and told plaintiff that he would have to amend his complaint promptly to identify those officials who were directly involved in the alleged acts giving rise to his claims. I told plaintiff that if, by September 27, 2004, he did not amend his complaint to identify the corrections officers involved, I would dismiss his case.

Now plaintiff has written a letter to the court in which he states that Sgt. Hanfeld, a Correctional Officer 3 at the Prairie du Chien Correctional facility, is the prison official who refused to allow him to wear his knee sleeve following his placement in segregation, and a Sgt. Mason is the individual responsible for removing the kneeling restriction tag from his cell door in March, 2004. In addition, plaintiff states, "I am also working on finding out who was on duty at the time that I slipped on the floor. I might need a little more time if possible."

Although it may appear to plaintiff to be a picky point, I cannot accept his letter as a substitute for an amended complaint. This is because Sgt. Hanfeld and Sgt. Mason must be served with plaintiff's complaint. The letter contains no factual allegations that would put defendants Hanfeld and Mason on notice of the claims plaintiff is raising against them,

and the original complaint shows different defendants in the caption and no references to Sgts. Hanfeld and Mason at all. Therefore, plaintiff will have to rewrite his original complaint to show Sgt. Hanfeld and Sgt. Mason in the caption of the complaint as the defendants, to remove the paragraph in which he says that the "three defendants listed in this suit did not directly offend against me. . . ," and to insert the names of the defendants in the body of the complaint where plaintiff makes his individual claims against them. Because plaintiff may not have realized that it would not be sufficient for him to simply name names without changing his original complaint, I will extend slightly the time within which he is to file his amended complaint.

As for plaintiff's comment that he is "working on finding out who was on duty at the time that [he] slipped on the floor," I make the following observations. In his complaint, plaintiff alleged that he injured his knee in a slip and fall on a bathroom floor because there was no sign warning him of the wet and slippery conditions. Nevertheless, I did not consider plaintiff's allegations relating to the slip and fall as making out any kind of constitutional claim that could be raised in the context of this lawsuit. Indeed, plaintiff's allegation that someone failed to put up a "slippery when wet" sign in the prison bathroom is a claim of negligence, which is a state law claim that must be raised in state court. Inadvertent error, negligence or even gross negligence are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). Therefore, for the

purpose of this lawsuit, plaintiff need not spend time attempting to learn the identity of the party responsible for failing to put up a sign in the bathroom to warn him of the slippery conditions.

Plaintiff does need to identify at least one more person, however, unless he intends to abandon his claim that an as yet unidentified person or persons deliberately refused to insure that he saw an orthopedic doctor after the results of his MRI showed the extent of the injuries to his knee. If plaintiff cannot determine informally the identity of the individual(s) responsible for this alleged unconstitutional act, plaintiff may name the warden of the institution in which the incident occurred (presumably the Prairie du Chien correctional facility), for the sole purpose of conducting discovery to learn the name(s) of the person(s) 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).

ORDER

IT IS ORDERED that plaintiff may have an enlargement of time to October 11, 2004, in which to file an amended complaint that will replace the original complaint he filed

in this case in which he identifies in the caption and in the body of the complaint the persons who allegedly violated his constitutional rights. If, by October 11, 2004, plaintiff fails to amend his complaint as directed, then I will dismiss this case as having been brought against persons who are not proper parties to the lawsuit.

Entered this 17th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge