IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSEPH WEHRHAHN,

Petitioner,

v.

MATTHEW FRANK,
RICHARD VERHAGEN
and GERALD BERGE,

Respondents.

ORDER

04-C-475-C

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This is a proposed civil action for monetary and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, 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

Petitioner Joseph Wehrhahn is an inmate at the Wisconsin Secure Program Facility in Boscobel Wisconsin. Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections and respondent Richard Verhagen is Administrative Superintendant. Respondent Gerald Berge is the warden at the Wisconsin Secure Program Facility.

On October 24, 2003, petitioner was using the bathroom when he slipped on a wet

floor. There was no wet sign warning him of the slippery conditions. As a result of his fall, petitioner tore his ACL, sprained his MCL, tore his lateral meniscus and fractured his lateral femoral condyle. Petitioner was told that he would be referred to an orthopedist as soon as possible, but that has not yet happened and he is in continuous pain.

On December 23, 2003, petitioner was given a knee sleeve and instructed to wear it until January 15, 2004. On December 23, 2003, petitioner was placed in segregated confinement and was not allowed to wear his knee sleeve. On February 3, 2004, petitioner was placed on another medical restriction under which he was not supposed to kneel. This restriction was to last indefinitely. In late February, petitioner went to Milwaukee County. When he returned on March 2, 2004, the tag noting the medical restriction on kneeling had been removed from petitioner's cell door and for the next two weeks, petitioner was made to kneel whenever he left his cell so that he could be placed in shackles.

DISCUSSION

A. Personal Involvement

I understand petitioner to allege that his constitutional rights were violated because he was diagnosed as requiring treatment from an orthopedist but not taken to see one, not allowed to wear a knee sleeve that a doctor instructed him to wear and made to kneel while under a medical restriction against kneeling. Petitioner starts off his petition by indicating

that "all three [respondents] listed in this suit did not directly offend against me. However, they are in charge of the people who did and are in a position of authority over them, so therefore are expected in my opinion to take responsibility."

The Court of Appeals for the Seventh Circuit has held that to recover damages under §1983, a petitioner must establish each respondent's personal responsibility for the claimed deprivation of a constitutional right. 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 at 369; Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). An official satisfies the personal responsibility requirement "if she acts or fails to act with a deliberate or reckless disregard of petitioner's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). Under §1983, an official may not be held liable simply because he is in a position of authority over the person who has committed the challenged actions. Polk County v. Dodson, 454 U.S. 312, 325 (1981).

Petitioner has not identified any link between respondents and the relevant events except that they have authority over the unnamed persons who were involved. He has not alleged any facts suggesting that any of the relevant acts were taken at the direction of or

with the knowledge and consent of any respondent. Because the officials he names as respondents may not be held liable under §1983 simply for occupying a position of authority, petitioner will not be allowed to proceed against them. However, I will give him an opportunity to amend his complaint. Had petitioner sued the persons directly involved in the alleged acts and provided some additional information about the circumstances of their involvement, he might have made out a claim for violation of his Eighth Amendment rights. Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir. 1996) ("when the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint").

B. Eighth Amendment

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) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). However, this does not mean that prisoners are entitled to whatever medical treatment they desire. Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care only when they are deliberately indifferent to a prisoner's serious medical needs. Id. at 104.

The Court of Appeals for the Seventh Circuit has recognized that a "'serious' medical

need is one that has been diagnosed by a physician as mandating treatment." Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997). Petitioner's allegation that a physician had referred him to an orthopedist, instructed him to wear a knee sleeve and directed him not to kneel is sufficient at this early stage in the proceedings to suggest that he had a serious medical need.

To show deliberate indifference, the plaintiff must establish that the official was "subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). Inadvertent error, negligence, ordinary malpractice, or even gross negligence does not constitute deliberate indifference. Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515 (7th Cir. 2002). Because petitioner has not identified any official who was personally involved, it is not possible to anticipate whether his allegations will satisfy the deliberate indifference standard. After he amends his complaint, petitioner will be allowed to proceed against any official if petitioner's alleged facts suggest that official was personally involved and acted with deliberate indifference to petitioner's medical needs.

ORDER

IT IS ORDERED that

1. Petitioner Joseph Wehrhahn is DENIED leave to proceed on his claim against

respondents Matthew Frank, Richard Verhagen and Gerald Berge for alleged violations of his constitutional rights which occurred when he was not seen by an orthopedist after having been referred to one and when he was made to kneel despite a medical restriction not to kneel;

2. Petitioner will have until September 27, 2004 in which to amend his complaint to identify those officials who were directly involved in the alleged acts and who acted with deliberate indifference to his serious medical needs. If, by September 27, 2004, petitioner fails to respond to this order, I will dismiss this case and record a strike against petitioner in accordance with 28 U.S.C. § 1915(g);

3. The unpaid balance of petitioner's filing fee is $147.24; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

Entered this 3rd day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge