IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BENJAMIN J. BIESE,

ORDER

Petitioner,

04-C-596-C

v.

PHILIP KINGSTON TRACY A.
JOHNSON and UNKNOWN OFFICER,

Respondents.

- -

This is a proposed civil action for injunctive 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). See 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).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is confined at the Columbia Correctional Institution and suffers from mental illness. Respondent Philip Kingston is the warden at the Columbia Correctional Institution. Respondent Tracy A. Johnson is a psychologist in housing units four and five at the Columbia Correctional Institution.

On July 10, 2004, at 6:00 p.m., petitioner took some job applications from the desk in the housing unit in which he resides. The job applications were printed on July 28, 2004

and are available to all inmates in the unit. When petitioner returned to his cell, he noticed that the job application had been printed on the back of a confidential psychological report about him. The report was made by respondent Johnson and typed on July 2, 2004. Petitioner immediately informed the housing unit sergeant, Sergeant Ulrich, about the issue. Ulrich took the application and informed petitioner that he would contact the shift commander for the second shift and that he would write an incident report. Petitioner was informed that one of the staff may have thought his psychological report was blank paper and inserted it into the printer and printed out the applications. (I assume that the staff member who printed out the applications is the respondent "unknown officer.")

Petitioner does not know how many inmates possess the job application with his psychological report printed on the back. Nevertheless, because of the incident, petitioner suffers from high stress and is afraid to speak to clinical staff for fear that another report may be released. On July 11, 2004, petitioner submitted a complaint about the careless exposure of his confidential psychological report. On July 15, 2004, the institution complaint examiner responded, acknowledging that through an inadvertent error a copy of petitioner's evaluation had a job application form printed on the opposite side. According to the complaint examiner's response, the confidentiality of clinical evaluations is not taken lightly and staff at Columbia Correctional Institution are taking steps to prevent such a mistake from happening again. The complaint examiner affirmed petitioner's complaint for

statistical purposes only.

DISCUSSION

Petitioner alleges that by exposing his confidential psychological report to the inmate population, respondents invaded his privacy in violation of the Eighth Amendment and committed a criminal offense in violation of Wis. Stat. § 146.84. "Whether prisoners have any privacy rights in their prison medical records and treatment appears to be an open question." Massey v. Helman, 196 F.3d 727, 742 n. 8 (7th Cir. 1999) (citing Anderson v. Romero, 72 F.3d 518, 522-23 (7th Cir.1995)). In Anderson, the Court of Appeals for the Seventh Circuit could not "find any appellate holding that prisoners have a constitutional right to the confidentiality of their medical records," but noted in dictum that the cruel and unusual punishment clause of the Eighth Amendment might protect against a state's dissemination of "humiliating but penologically irrelevant details of a prisoner's medical history."

Other courts of appeals have analyzed a prisoner's right to privacy in his medical information under the First and Fourteenth Amendments. Doe v. Delie, 257 F.3d 309, 317 (3d Cir. 2001) (acknowledging a constitutional right to privacy in one's medical information but stating that such right may be curtailed by policy or regulation shown to be "reasonably related to legitimate penological interests") (citing Turner v. Safley, 482 U.S. 78 (1987));

Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999) (prisoners have right to maintain confidentiality of previously undisclosed medical information and prison officials can impinge on that right only to extent that their actions are "reasonably related to legitimate penological interests").

The Eighth Amendment prohibits cruel and unusual punishment. "Punishment" implies, at a minimum, actual knowledge of the risk of harm, so that a conscious refusal to prevent the harm can be inferred from the defendant's actions or inaction. Walsh v. Mellas, 837 F.2d 789, 795 (7th Cir. 1988). Thus, to state a claim under the Eighth Amendment, the inmate must establish more than mere negligence on the part of prison officials. As petitioner himself wrote in his complaint to the inmate complaint examiner, the exposure of his psychological report was the result of carelessness. The inmate complaint examiner acknowledged that the exposure was the result of error, that the confidentiality of clinical evaluations are not taken lightly and that staff at Columbia Correctional Institution are taking steps to prevent such an occurrence from happening again. Petitioner does not allege any facts from which an inference may be drawn that the exposure was deliberate. At most, petitioner alleges negligence on the part of respondents in making his medical information accessible to the inmate community. However, 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).

Similarly, negligence is not enough to state a claim under the First or Fourteenth Amendments. In general, negligence is not sufficient to state a claim for relief under § 1983. Kincaid v. Vail, 969 F.2d 594, 602 (7th Cir. 1992) (holding that negligence does not rise to level of constitutional violation under 42 U.S.C. § 1983). Petitioner will be denied leave to proceed in forma pauperis on his claim that respondents violated his constitutional rights when they inadvertently printed a job application on the back of his psychological report.

Because I am denying petitioner leave to proceed on his § 1983 claim against respondents, I will decline to exercise supplemental jurisdiction over petitioner's claim that respondents violated Wis. Stat. § 146.84. 28 U.S.C. § 1367(c)(3). Petitioner is free to pursue his state law claim in state court.

ORDER

1. Petitioner Benjamin Biese's request for leave to proceed in forma pauperis on his Eighth and First Amendment claims is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is $141.44; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

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

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

Entered this 17th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge