IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TERRANCE EDWARDS,

ORDER

Petitioner,

04-C-664-C

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, WISCONSIN STATE LABORATORY of HYGIENE, OUTAGAMIE COUNTY JAIL, OUTAGAMIE JAIL STAFF #311 (Frank) and #212 or 712 (Marcia),

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Dodge Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. He alleges that respondents Wisconsin Department of Corrections, Wisconsin State Laboratory of Hygiene, Outagamie County Jail and Outagamie County Jail staff #311 (Frank) and #212 or 712 (Marcia) failed to treat him for syphilis in violation of the Eighth Amendment. 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 Terrance Edwards is an inmate at the Dodge Correctional Institution in Waupun, Wisconsin. Respondents Wisconsin Department of Corrections and Wisconsin

State Laboratory of Hygiene are state agencies. Respondent Outagamie County Jail employs respondents staff #311 (Frank) and staff #212 or 712 (Marcia).

In 1999, while in the custody of respondent Department of Corrections, petitioner was tested for syphilis using the Venereal Disease Research Laboratory (VDRL) test after he noticed small white bumps on his penis. When his test results showed a VDRL level of 1:32, he was placed on treatment for the syphilis. After receiving treatment, his physical manifestations subsided. In 2000, while incarcerated in the Milwaukee County jail, he was tested again and found to have a VDRL level of 1:1. In December 2000, petitioner was transferred to the Dodge Correctional Institution where all new inmates should be checked for communicable diseases. Although syphilis is a communicable disease, petitioner was not tested for it when he was transferred there. At some point during the next three months, petitioner was transferred to the Outagamie County jail. During the time he was at the Dodge facility and at the beginning of his incarceration in Outagamie County, petitioner had no physical symptoms.

In March 2001, petitioner was placed at the Waukesha County jail so that he could attend court. While there, he noticed that he had more small white bumps and requested treatment from the jail hospital unit. Waukesha County jail medical staff drew a sample of petitioner's blood for testing. Petitioner had not been told of the results of that test by the time he was transferred back to the Outagamie facility. Shortly after his return, petitioner

submitted a request for medical treatment and informed medical staff that his blood had been drawn for testing while he was in Waukesha but that he had not heard about the results. The Outagamie medical staff drew another sample of petitioner's blood for testing and told petitioner that he was fine and denied him any further treatment. In March 2004, petitioner saw his medical record, which indicated that the Outagamie medical staff had contacted officials in Waukesha County who had indicated that petitioner's VDRL level was 1:8 and that petitioner's syphilis could be reactive but further testing would be necessary to confirm this.

Petitioner's medical records also indicate that the second blood sample revealed no active disease process. On April 27, 2001, respondent Marcia indicated in petitioner's medical chart that the blood sample that was taken at Outagamie was sent to a state lab but that an employee at the lab, Lori Ann, later said the sample was not there. Respondent Marcia also wrote that "[she] contacted St. E's and Mercy lab and they [said that] the sample was sent to Marshfield lab. John from Mercy lab will contact Marshfield to track down the sample and the results. Will contact Lori Ann when the results from Mercy are received to find out how to proceed." On April 28, 2001, respondent Frank wrote in petitioner's chart that he "received a call from John at Mercy [who stated] that he spoke to Lori Ann from state and she indicated no active disease process. Retest in 3-4 months." Respondent John also indicated that he reviewed the test results with petitioner. However,

petitioner was never told about these results or that he should be retested in 3-4 months.

Petitioner was transferred out of the Outagamie facility in August of 2001. He was not retested until 2003 when petitioner told a doctor at the Waupun facility that he had lesions around his penis. The test revealed that his syphilis was reactive and the doctor ordered that petitioner receive immediate treatment. Several months later, additional testing revealed that the treatment had been unsuccessful. A doctor at the facility ordered additional treatment but the nurses have not given petitioner the treatment ordered because a public health employee, who is not a doctor, indicated that the treatment would not do any good because of the advanced stage of the disease. If untreated, syphilis can cause lesions, blindness, brain damage and even death. As a result of not receiving treatment from 2001 through 2004, petitioner has suffered discoloration and lesions on his penis, deteriorated vision and neurological problems.

DISCUSSION

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)). Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care when they are deliberately indifferent to a prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104

(1976). To state a claim under the Eighth Amendment, petitioner must allege facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Petitioner contends that respondents violated the Eighth Amendment by failing to retest him 3-4 months after April 2001 and by failing to provide him treatment ordered by a physician at some point in 2003 or 2004.

A. Respondents Outagamie Jail Staff #311 (Frank) and #212 or 712 (Marcia)

To establish individual liability under 42 U.S.C. § 1983, petitioner must allege that the individual respondents were involved personally in the alleged constitutional deprivations. "'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.'" Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir.1994)). See also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary.").

Petitioner's allegations regarding the personal involvement of respondents Frank and Marcia do not meet this standard. With respect to respondent Marcia, petitioner's only allegation is that she wrote in his chart that she had attempted to track down the results of

petitioner's second blood test. Petitioner has not alleged any fact suggesting that she ever learned that the test results came back negative, that she had any reason to doubt this result, that she knew that petitioner should have been retested in 3-4 months, that she ever learned petitioner's later tests revealed that his syphilis became reactive or that she had anything to do with the denial of prescribed treatment. Respondent Marcia cannot be held liable for simply making efforts to track down a blood sample. Accordingly, petitioner may not proceed against her.

With respect to respondent Frank, petitioner alleges that respondent Frank knew that petitioner should be retested in 3-4 months, noted the need for retesting in petitioner's medical chart but failed to tell petitioner. Although it is not necessary that the respondent participate directly in the deprivation, the official is must have "act[ed] or fail[ed] 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 and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). Because respondent Frank noted the need for retesting in petitioner's medical chart, it cannot be said that his actions demonstrate "deliberate or reckless disregard" to petitioner's need for future medical care. Moreover, according to the complaint, the retesting should have taken place at some point in August or September of 2001. However, petitioner was transferred away from the Outagamie jail where respondent Frank was employed in August of 2001. Respondent Frank

had no control over petitioner's medical care at the time the recommended retesting time-frame expired. Failing to insure that petitioner was retested during the first half of the recommended time-frame also does not rise to the level of deliberate or reckless disregard. Because petitioner has failed to allege facts showing that respondent Frank was personally involved in the alleged constitutional violations, petitioner will not be allowed to proceed against him.

B. Respondents Department of Corrections, Outagamie County Jail & Laboratory of Hygiene

Petitioner has named as respondents the Wisconsin Department of Corrections, the Outagamie County Jail and the Wisconsin State Laboratory of Hygiene. Under Rule 17(b) of the Federal Rules of Civil Procedure, capacity to sue or be sued is determined by the law of a party's domicile. In Wisconsin, a governmental unit is considered to be an independent body politic and thus subject to suit only if it possesses independent proprietary functions and powers such as the power to levy taxes, to incur liability beyond an amount appropriated by the legislature, to hold title to property in its own name, or to dispose of real and personal property without express authority from the state. Majerus v. Milwaukee County, 39 Wis. 2d 311, 314-15, 159 N.W. 2d 86 (1968); Sullivan v. Board of Regents of Normal Schools, 209 Wis. 242, 244, 244 N.W.2d 563 (1932). These named respondents do not have such

independent powers and therefore, are not capable of being sued. Accordingly, petitioner will be denied leave to proceed against them.

C. Amending the Complaint

Because petitioner failed to name as a respondent any entity or person both capable of being sued and personally involved in the alleged constitutional violation, he will not be granted leave to proceed at this point. However, I will allow him to amend his complaint to name as a respondent any government official who meets the personal involvement standard that I have laid out above. His allegations suggest that he may have an Eighth Amendment denial of medical care claim against the public health employee who directed nurses at the Dodge facility to disregard a physician's prescribed treatment plan and the nurses who listened to the public health employee and denied petitioner treatment. Petitioner does not need to identify their names at this point; he may simply name them as respondent "Doe" for the time being. However, he must clearly express his intent to sue these individuals and allege facts showing that each named respondent is personally involved. If petitioner does sue these individuals as "Doe" defendants, he must also name as a respondent an official from whom he might be able to discover the names of those responsible for the alleged violation. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (explaining that a prisoner may name a high-level prison official as a defendant to

uncover through discovery the names of persons directly responsible). In this case, petitioner might be able to obtain the names of the public health employee and the nurses at the Dodge facility from John Betts, the warden.

If petitioner decides to amend his complaint, he should bear in mind that if he is to succeed on an Eighth Amendment claim, he will have to prove at trial or at summary judgment that his named respondent had a sufficiently culpable state of mind. Gutierrez, 111 F.3d at 1369. Although the standard for deliberate indifference is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result, Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996), petitioner must be able to show at least that the respondents actually knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk. Id. "Negligence, gross negligence, or even 'recklessness' as that term is used in tort cases, is not enough" to state a claim under the Eighth Amendment. Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985).

If petitioner does not think that he will be able to meet such a weighty standard of proof, he might consider filing a negligence tort action in state court. In Wisconsin, the elements of a negligence claim are: (1) the existence of a duty of care on the part of the defendant; (2) a breach of that duty of care; (3) a causal connection between the defendant's breach of the duty of care are and the plaintiff's injury; and (4) actual loss or damage

resulting from the injury. Smaxwell v. Bayard, 2004 WI 101, ¶ 32, ___ Wis. 2d ___, 682 N.W.2d 923, 933. However, if he chooses this route, petitioner must file a notice of claim pursuant to Wis. Stat. § 893.82(3), which provides

> no civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or c ommitted in the course of the discharge of the officer's, employee's or agent's duties . . . unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employee or agent involved.

Because petitioner is an inmate, he "may not commence the civil action or proceeding until the attorney general denies the claim or until 120 days after the written notice . . . is served upon the attorney general, whichever is earlier." Wis. Stat. § 893.82 (3m).

ORDER

IT IS ORDERED that petitioner Terrance Edwards is DENIED leave to proceed on his claim that respondents Wisconsin Department of Corrections, Wisconsin State Laboratory of Hygiene, Outagamie County Jail and Outagamie County Jail staff #311 (Frank) and #212 or 712 (Marcia) failed to treat him for syphilis in violation of the Eighth Amendment. Petitioner may have until November 19, 2004, in which to amend his

complaint to name as respondents individuals who were personally involved in the alleged denial of treatment. If petitioner does not amend his complaint by that date, the clerk of court is directed to enter judgment dismissing this case without prejudice to petitioner's filing a new lawsuit at a later date.

Entered this 1st day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge