IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LUIS A. RAMIREZ,

ORDER

Petitioner,

04-C-0786-C

v.

GARY R. McCAUGHTRY,
ANTHONY MELI, MARC CLEMENTS,
TOD RUSSEL, JOHN DOE ##1, 2 and 3,
STEVEN SCHUELER and CURT JANSSEN,

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 Waupun Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Petitioner seeks compensatory and punitive damages from respondents in their official and individual capacities. From the trust fund account statement petitioner has given the court, it appears that petitioner has no means with which to pay an initial partial payment of the $150 fee for filing his complaint. Therefore, he may proceed in this action without making an initial partial payment. 28 U.S.C. § 1915(b)(4).

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 an inmate at the Waupun Correctional Institution in Waupun, Wisconsin. Respondent McCaughtry is the warden at the Waupun Correctional Institution. Respondent Meli is a lieutenant; respondent Clements is the security director; respondents

John Doe ## 1, 2 and 3 are officers at the facility; respondent Schueler is the head of security for segregation; and respondent Janssen serves as the unit manager of segregation.

On January 15, 2002, officials at the Waupun Correctional Institution conducted a cell extraction after petitioner refused to comply with a request that he "put [his] hands out the trap." Respondent Meli was the supervisor on duty and respondents Russel and John Doe ##1, 2 and 3 were on the extraction team. Respondents Meli, Russel and John Doe ##1, 2 and 3 entered petitioner's cell and all respondents except respondent Meli beat petitioner, punching him in the nose and ribs and kneeing him in the groin. Meli did not intercede on petitioner's behalf during the extraction. After petitioner was removed from his cell, respondent Meli ordered the members of the extraction team to place petitioner in another cell without any clothes, sheets, blankets, pillows or a mattress. Petitioner could see his own breath in the cell and had to sleep on the cold floor. He experienced pain in his ribs, face and arm, numbness in his nose and bleeding in unspecified areas. The morning after the extraction, petitioner was examined by a doctor, and his injuries were photographed. After having seen petitioner's injuries and a video recording of the extraction, respondent Schueler allowed prison officials to place petitioner in another cold room wearing only underwear and a tee shirt. Petitioner was unable to sleep because of the cold temperatures and he did not eat the "seg loaf" he was given.

DISCUSSION

I understand petitioner to allege the following claims. First, respondents Russel and John Doe ##1, 2 and 3 used excessive force during the room extraction in violation of the Eighth Amendment. Second, respondent Meli violated petitioner's Eighth Amendment rights by failing to prevent the members of the extraction team from using excessive force. Third, respondent Meli ordered petitioner to be placed in a cold cell without any clothes or other means of warming himself. Fourth, respondents Schueler, Meli, Russel and John Doe ##1, 2 and 3 were deliberately indifferent to petitioner's medical needs when they placed him in a cell and prevented him from receiving proper medical treatment for his injuries. Fifth, respondents McCaughtry, Clements and Janssen failed to address the excessive force applied to petitioner during the room extraction.

A. No Monetary Relief in Official Capacity

Petitioner states that he is suing each respondent in his official and individual capacity. State employees cannot be sued for retrospective monetary relief in their official capacities. Duncan v. State of Wisconsin Dept. of Health and Family Services, 166 F.3d 930, 934-35 (7th Cir. 1999). Although prospective injunctive relief is available against state officials sued in their official capacities, petitioner has not requested injunctive relief. He cannot obtain money damages against respondents in their official capacities, but he can

obtain monetary relief from respondents in their individual capacities if he succeeds in his suit against them.

B. Excessive Force

Petitioner alleges that the members of the extraction team, respondents Russel and John Doe ##1, 2 and 3, used excessive force during the room extraction in violation of the Eighth Amendment. Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court must consider factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. See Whitley v. Albers, 475 U.S. 312, 321 (1986). According to petitioner, respondents Russel and John Doe ##1, 2 and 3 entered his cell and punched him in the ribs and nose and kneed him in the groin after he refused to put his hands through the trap on his cell door. Petitioner does not allege what his conduct was during the incident aside from his refusal to place his hands through the trap. However, at this early stage of the proceedings, petitioner's allegations are sufficient

to state a claim of excessive force under the Eighth Amendment against these respondents. Although there is no allegation that respondent McCaughtry was involved personally in the room extraction, I note that petitioner alleges that three unnamed respondents participated in the room extraction. As the warden, respondent McCaughtry is in a better position than petitioner to identify these unnamed members of the extraction team. Therefore, respondent McCaughtry will remain a party in this case for the sole purpose of identifying the three unnamed members of the extraction team. Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981).

C. Failure to Prevent Excessive Force

Petitioner alleges that respondent Meli was the supervisor on the day of the room extraction and that he was present but did not intercede when respondents Russel and John Doe ##1, 2 and 3 used excessive force. 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. A respondent's direct participation in the deprivation is not required. Instead, 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). 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, 761 F.2d at 369; Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). The doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Petitioner alleges that respondent Meli "was negligent in his duties to prevent excessive force." Although allegations of negligence are insufficient to state a claim under the Eighth Amendment, Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985), petitioner's complaint alleges more than mere negligence when construed broadly. Petitioner's allegations suggest that respondent Meli observed members of the extraction team using excessive force on petitioner but did nothing to stop it, despite having authority to do so. At this stage of the proceedings, I must assume that petitioner could prove this set of facts, which is enough to allow petitioner to proceed against respondent Meli on his excessive force claim.

D. Placement in Cold Cell

Petitioner alleges that after the extraction team beat him, respondent Meli ordered the team to place petitioner in a "freezing cell with no clothes, sheets, blankets, mattress,

pillow or anything to shield [him] from the cold." Petitioner alleges that he could see his breath while in the cell and that he had to sleep on the floor. Petitioner contends that these conditions subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

Prisoners are entitled to "the minimal civilized measure of life's necessities." Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)). This includes a right to protection from extreme cold. Dixon, 114 F.3d at 645-46 (holding that cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment). "[C]ourts should examine several factors in assessing claims based on low cell temperature, such as the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold." Id. at 644. In certain circumstances, an extremely cold cell temperature may violate the Eighth Amendment. Although at this early stage I cannot say that petitioner could not prove any set of facts entitling him to relief on this claim, I note that he faces an uphill battle. To succeed on this claim, petitioner will have to produce evidence of the actual temperature in his cell during the time in question and be prepared to prove that as a result of the extreme cold he suffered ill effects beyond mere discomfort. Although petitioner does not allege that he suffered any adverse health effects as a result of

the cold temperature, I will allow petitioner to proceed on this claim against respondents Meli and Schueler.

E. Deliberate Indifference to Medical Needs

Petitioner alleges that respondents Meli, Russel and John Doe ##1, 2 and 3 were deliberately indifferent to his serious medical needs because they refused to allow him to seek medical treatment for his injuries after the room extraction. Petitioner alleges that he was left in a cell bleeding and with pain in his face, arm and ribs. Petitioner alleges that he was not examined by a doctor until the day after the room extraction. In addition, petitioner alleges that respondent Schueler, as head of security in the segregation wing, failed "to address" the excessive force used in the room extraction and allowed petitioner to be in a segregation cell after even after he saw petitioner's physical condition and a videotape of the room extraction.

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) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Therefore, petitioner must allege facts from which it can be inferred that he had a serious

medical need and that prison officials were deliberately indifferent to this need. Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Attempting to define "serious medical needs, " the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371. In this case, petitioner's allegations are not sufficient to state a deliberate indifference claim. He has alleged that he was examined by a doctor within twenty-four hours of the extraction. Petitioner does not allege that the examination revealed any condition from which an inference could be drawn that he had a serious medical need. Therefore, petitioner will be denied leave to proceed on his deliberate indifference claims against respondents Schueler, Meli, Russel and John Doe ##1, 2 and 3.

G. Respondents McCaughtry, Clements and Janssen

Finally, petitioner alleges that respondents McCaughtry, Clements and Janssen were negligent by not addressing the excessive force used on petitioner and his placement in the cold cells for several days. Allegations of negligence are insufficient to state a claim under the Eighth Amendment. Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985). Unlike the allegations of negligent supervision leveled at respondent Meli, petitioner's allegations

about respondents McCaughtry, Clements or Janssen do not suggest that these respondents were present during the room extraction or at any other time relevant in this case. Petitioner does not allege that respondents McCaughtry, Clements or Janssen ordered, knew of, or condoned the conduct of the extraction team. Petitioner does not allege that any of these respondents ordered petitioner's placement in the cold cells for three days after the extraction or even knew of it. Thus, petitioner will be denied leave to proceed on his claim against respondents McCaughtry, Clements and Janssen.

ORDER

IT IS ORDERED that

1. Petitioner Luis A. Ramirez's claims are DISMISSED to the extent that petitioner seeks monetary relief from respondents in their official capacities.

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his claim that respondents Tod Russel and John Doe ##1, 2 and 3 used excessive force during the January 15, 2002 room extraction in violation of the Eighth Amendment.

3. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his claim that respondent Anthony Meli violated his Eighth Amendment rights by failing to prevent the members of the extraction team from using excessive force on him.

4. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his

claim that respondents Meli and Steven Schueler subjected him to cruel and unusual punishment in violation of the Eighth Amendment by placing and holding him in an extremely cold cell without clothes.

5. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claim that respondents Schueler, Meli, Russel and John Doe ##1, 2 and 3 were deliberately indifferent to his serious medical needs after the room extraction.

6. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claim against respondents McCaughtry, Clements and Janssen that their negligence in failing to address the excessive force used on him constituted cruel and unusual punishment in violation of the Eighth Amendment. Respondents Clements and Janssen are DISMISSED from this case. Respondent McCaughtry will remain a party in this case for the sole purpose of assisting in learning the identities of the three unnamed members of the extraction team. He will then be dismissed.

7. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

8. Petitioner should keep a copy of all documents for his own files. If petitioner does

not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

9. The unpaid balance of petitioner's filing fee is $150.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

10. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.

Entered this 15th day of November, 2004

BY THE COURT:

BARBARA B. CRABB
District Judge