

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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CANYON A. THIXTON,

Plaintiff,

v.

GERALD BERGE (in his individual capacity);  
JON LITSCHER (in his individual capacity);  
BRAD HOMPE (in his individual capacity);  
BRIAN KOOL (in his individual capacity),

Defendants.

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ORDER

05-C-620-C

This is a civil action for monetary relief under 42 U.S.C. § 1983. Plaintiff Canyon A. Thixton is currently detained at the Racine Correctional Institution in Racine, Wisconsin. In an order dated December 28, 2005, I screened plaintiff's proposed complaint, which detailed events that allegedly occurred during his detention at the Wisconsin Secure Program Facility. I denied plaintiff leave to proceed on several claims and granted him leave to proceed on an Eighth Amendment claim concerning his placement in a "Continuum" program at the facility. In addition, I stayed a decision whether to grant leave to proceed on two of plaintiff's claims: (1) his claim that defendant Berge or defendant Litscher denied

him meals in violation of the Eighth Amendment and (2) his claim that correctional officers beat him and denied him medical care in violation of the Eighth Amendment. I gave petitioner an opportunity to supplement his complaint with answers to questions designed to clarify these claims.

With respect to plaintiff's claim concerning the denial of meals, I ordered him to advise the court whether he was denied meals for any reason other than his failure to follow rules at the Secure Program Facility. With respect to his claim that he was beaten and denied medical care, I ordered petitioner to provide the names of the officers who allegedly beat him, the approximate date on which the alleged beating occurred and the names of the prison officials who allegedly failed to provide him medical treatment. Now plaintiff has filed a proposed second amended complaint. With respect to his claim regarding the denial of meals, plaintiff alleges that defendants Berge or Litscher or "unknown individuals under their control" denied him approximately ten meals over the six and a half months he was detained at the facility and that the denials were not in response to his failure to follow facility rules but were malicious and arbitrary. (He does not allege when these denials allegedly took place.) With respect to his claim that he was beaten and denied medical care, plaintiff alleges that he was beaten by "Officer Esser and Captain or Lieutenant Linjer" on or about July 10, 2001 and that he was denied medical care by someone he identifies as "Nurse Patti."

#### A. Denial of Meals

In the December 28 order, I noted that the Court of Appeals for the Seventh Circuit ruled recently that denying an inmate meals in response to his refusal to follow prison rules is not “punishment” for the purpose of the Eighth Amendment. Rodriguez v. Briley, 403 F.3d 952 (7th Cir. 2005). Because it was not clear whether plaintiff was alleging that he was denied meals as a result of his failure to comply with prison rules, I stayed a decision on this claim and gave plaintiff an opportunity to clarify this point. Plaintiff’s answer indicates that his claim is not barred by Rodriguez. Nonetheless, there are several problems with his allegations.

The first problem concerns the personal involvement of defendants Berge and Litscher. It is well established that liability under § 1983 must be based on a defendant’s personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); 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.” Wolf-Lillie, 699 F.2d at 869. It is not necessary that a defendant participate directly in the deprivation; the official is sufficiently involved “if she acts or fails to act with a deliberate or reckless disregard of plaintiff’s constitutional rights, or if the conduct causing the constitutional deprivation occurs at her

direction or with her knowledge and consent.” Smith v. Rowe, 761F.2d 360, 369 (7th Cir. 1985). However, respondeat superior liability does not exist under § 1983; supervisory officials may not be held liable for the misconduct of persons under their control merely because they are supervisory officials. Doyle v. Camelot Care Centers, Inc., 305 F.3d 603, 614-15 (7th Cir. 2002). Plaintiff alleges that at the time he was denied meals, defendant Berge was Warden at the Secure Program Facility and defendant Litscher was Secretary of the Department of Corrections. Because of their positions, it is highly unlikely that they were personally involved in denying plaintiff meals.

The second problem is that plaintiff’s allegations are not serious enough to state a claim under the Eighth Amendment, which guarantees inmates the “minimal civilized measure of life’s necessities.” Christopher v. Buss, 384 F.3d 879, 882 (7th Cir. 2004) (citation and quotations omitted). To state a claim, an inmate must allege that prison officials subjected him to a objectively serious deprivation and that they acted with deliberate indifference in doing so. Farmer v. Brennan, 511 U.S. 825, 834 (1994). Plaintiff’s allegation that he was denied meals arbitrarily and maliciously is probably sufficient to satisfy the deliberate indifference prong. However, plaintiff’s allegation that he was denied approximately ten meals over a six and a half month period is not an objectively serious deprivation. Berry v. Brady, 192 F.3d 504, 506-07 (5th Cir. 1999) (ruling that denial of eight meals over seven month period did not support Eighth Amendment claim);

Talib v. Gilley, 138 F.3d 211 (5th Cir. 1998) (affirming dismissal of claim alleging denial of fifty meals over course of five months). Plaintiff did not allege when these denials occurred during his six and a half month detention at the facility. He has not alleged that denial of these meals created a serious risk to his health or even caused him any discomfort. Also, he has not alleged that he lost weight, suffered other adverse physical effects or that he was denied a nutritionally adequate diet. To be sure, denying an inmate food for no reason is a petty and reprehensible act. However, unless the denial creates a serious risk to an inmate's health or is sufficiently prolonged so as to cause considerable pain, it is not sufficiently serious to implicate the Eighth Amendment. Leslie v. Doyle, 125 F.3d 1132, 1137 (7th Cir. 1997) ("the Constitution does not create a cause of action for arbitrary and purposeless acts by officials per se; it prohibits the abuse of power that effects a *significant* deprivation) (emphasis in original). Because plaintiff has not alleged that he was subject to an objectively serious deprivation, I will deny his request for leave to proceed on this claim.

#### B. Assault and Denial of Medical Care

In his proposed second amended complaint, petitioner alleges that he was beaten by "Officer Esser and Captain or Lieutenant Linjer" on or about July 10, 2001 and that he was denied medical care by someone he identifies as "Nurse Patti." Two claims arise from these allegations, both under the Eighth Amendment: excessive force and denial of medical care.

With respect to plaintiff's excessive force claim, plaintiff's allegation meets the notice pleading requirements of Fed. R. Civ. P. 8, but barely so. However, I must deny plaintiff leave to proceed on this claim because he has not named Esser and Linjer as defendants. Because liability under § 1983 is based on a state official's personal involvement in a deprivation of federal rights, an inmate must name as defendants those prison officials who he believes violated his constitutional rights.

With respect to plaintiff's claim that he was denied medical care, his allegation suffers in two respects. First, plaintiff's identification of the individual who denied him medical care as "Nurse Patti" is insufficient to accomplish service of process on her. Under Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981), an inmate who states a claim but is unsure of the identity of the defendant may name a supervisory official as a defendant for the sole purpose of discovering the identity of the proper defendant. If, as it appears, plaintiff does not know the full name of the individual who allegedly denied him medical care, he should name as a defendant an official at the Wisconsin Secure Program Facility (such as the head of the health services unit) who is likely to know the identity of the individual or have access to records that contain the individual's name. Second, the Eighth Amendment does not prohibit all denials of medical care, merely those that constitute deliberate indifference to a serious medical need. Estelle v. Gamble, 429 U.S. 97, 106 (1976). Petitioner has made no allegations suggesting that he was suffering a serious medical need following the alleged

assault and that Nurse Patti was deliberately indifferent to it.

For now, I will deny plaintiff's request for leave to proceed on his excessive force and denial of medical care claims without prejudice to plaintiff's filing a third proposed amended complaint (1) alleging minimal facts suggesting an Eighth Amendment claim with respect to the denial of medical care and (2) naming as defendants Esser, Linjer and an official at the Wisconsin Secure Program Facility likely to have knowledge of or access to records showing who denied plaintiff medical care after he was beaten.

#### ORDER

IT IS ORDERED that

1. Plaintiff Canyon Thixton's request for leave to proceed on his claim that defendants Berge or Litscher violated his rights under the Eighth Amendment by denying him approximately ten meals over a period of six and a half months is DENIED; and
2. Plaintiff's request for leave to proceed on his claims that he was beaten and denied medical care is DENIED without prejudice to plaintiff's filing a proposed third amended complaint alleging minimal facts sufficient to support a claim of deliberate indifference to

a serious medical need and naming as defendants the appropriate prison officials.

Entered this 23rd day of January, 2006.

BY THE COURT:

*Barbara B. Crabb*

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BARBARA B. CRABB  
District Judge