IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SCOTT REIDELL,

Petitioner, ORDER

v. 05-C-667-C

MATTHEW J. FRANK,
CO RON GRAY, in his individual capacity,
and CO CLARK, in his individual capacity,

Respondents.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

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); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner alleges the following violations: (1) respondent Gray violated petitioner's rights under the Eighth or Fourteenth Amendment by releasing his hold on petitioner as he exited the van in the hospital parking lot; (2) respondent Gray violated petitioner's rights under the First Amendment when he retaliated against petitioner for filing an offender complaint; (3) respondent Clark violated petitioner's rights under the Eighth Amendment when he refused him access to medical care; and (4) respondent Frank violated petitioner's rights under the Eighth Amendment by sanctioning the use of inappropriate bodily restraints.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Scott Reidell is a Wisconsin state inmate presently housed at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Respondents Gray and Clark are corrections officers at the New Lisbon Correctional Institution and respondent Matthew J. Frank is Secretary of the Department of Corrections.

Petitioner was incarcerated at the Jackson Correctional Institution when the events giving rise to this lawsuit transpired. On August 3, 2004, petitioner was transported from the Jackson facility to the University of Wisconsin hospital. Petitioner was restrained at his waist and ankles, when waist restraints would have been sufficient. Because petitioner was wearing ankle restraints, he slipped as he stepped out of the van in the hospital parking lot. As he slipped, respondent Gray "released his hold" on petitioner. Petitioner fell and injured his back. Petitioner was allowed to see a nurse for his back pain while he was at the hospital.

When petitioner returned to the Jackson facility, he asked several times to see the medical staff because of the swelling and pain in his back. Respondent Clark denied him access to medical care repeatedly. Petitioner's injuries got worse.

On August 5, 2004, petitioner filed an offender complaint against respondent Gray regarding the incident when petitioner fell as he stepped out of the van. Respondent Gray retaliated against petitioner for filing the offender complaint by writing a conduct report against petitioner.

Earlier, on August 3, 2004, petitioner filed an offender complaint stating:

> On 8-03-04 around 8pm the injury in my lower back from being drop in the UW Hospital parking lot worsen. I could barely walk/swelling increased and the pain was severe. I ask the acting sargent Melrose Unit C/O Clark if I could go to HSU for medical emergency. C/O Clark stated Lt. Devorak there was no need to send him. My complaint is I was denied medical treatment.

The institution complaint examiner issued the following response to petitioner's offender complaint:

> Inmate Reidell writes in his complaint that he asked unit staff if he could go to HSU at 8pm on 08/03/04, and the request was denied. He was told by staff, per Lt. Dvorek, there was no need for him to go to HSU. He writes, "I was denied medical treatment."
> The complainant fell and injured his back while exiting the van (see JCI-2004-25278) on 08/03/04. He was seen while at UW Hospitals. Upon his return to JCI, he was seen by Nurse Meier at 7:00pm. (An ice bag and pain medications were ordered). He was scheduled to be seen on the following day. (Inmate Reidell was seen in HSU on 08/04/04 at 3:00 pm and again on 08/05/04 by Dr. Springs.)
> According to Lt. Dvorek, because the complainant had just left HSU, there was no need for him to return.
> This examiner fails to see how the complainant was denied medical treatment. In addition, noting that he was just given medical instruction for the ice bag and medication, the complainant should allow time for these to work (alleviate the pain). It is recommended to dismiss . . .

On September 20, 2004, the complaint reviewer dismissed petitioner's offender complaint.

Petitioner appealed the dismissal, writing:

> I am at a complete confusion on why this report had been dismissed. I was injured and it was not properly or ethically followed up in a safe manner. For example, it states in the complaint that Nurse Meier ordered medication. Now what does that have to do with medical attention other than it was a

> basic diagnosis to try and get by. I was in pain and I seeked medical attention for that. You can not determine what is wrong by prescribing ice and Ibuprofen. What is saying that there was not nerve or other damage. This should have never went this far and being at the University Hospital I should have been completely looked at, not moved with out proper medical assistance so many violations according to any procedure. Since this time it should also be noted that I have not received any attention as far as a check up.

DISCUSSION

A. Respondent Gray

Petitioner contends that when he was transported to the hospital he slipped as he stepped out of the van and respondent Gray "released his hold" on him, causing him to fall and injure his back. The Eighth Amendment prohibits cruel and unusual punishment for those convicted of crimes. It protects against some deprivations that are not part of a sentence but are suffered during imprisonment. Estelle v. Gamble, 429 U.S. 97 (1976). However, the traditional notion of a "punishment" implies an act that is "deliberately administered for a penal or disciplinary purpose, with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners." Leslie v. Doyle, 125 F.3d 1132, 1137 (7th Cir. 1997) (quoting Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973)). Petitioner's factual allegations do not suggest that respondent's actions were intended as punishment or discipline. Therefore, he has not made

out a claim under the Eighth Amendment.

The next question is whether his claim falls under the substantive due process protections of the Fourteenth Amendment, id. at 1136-37, which provides a prisoner with protection against abuses of power by prison officials that are so arbitrary that they shock the conscience. County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998) (citing Rochin v. California, 342 U.S. 165, 172 (1952)).

Although "the measure of what is conscience-shocking is no calibrated yard stick," it does provide some guidance. County of Sacramento, 523 U.S. at 847 (citing Johnson, 481 F.2d at 1033). It is not enough that a respondent's acts were negligent. Id. at 849 ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"); Payne for Hicks v. Churchich, 161 F.3d 1030, 1041 (7th Cir. 1998). "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." County of Sacramento, 523 U.S. at 846. In order to meet this conscience-shocking standard, petitioner will have to adduce evidence to prove that respondent Gray intended to injure petitioner by deliberately dropping him on the ground. Id. at 849 (behavior most probable to support a substantive due process claim is that done with intent to injure).

Reading petitioner's complaint with the generosity owed to any pro se litigant, I understand him to allege that respondent Gray acted with a deliberate intent to injure him. Accordingly, petitioner will be granted leave to proceed against respondent Gray on a

Fourteenth Amendment substantive due process claim. However, if I have misconstrued petitioner's allegations, and petitioner did not intend to allege that respondent Gray maliciously intended to injure him by deliberately dropping him on the ground, then petitioner should consider withdrawing this claim, as it would not make out a claim of constitutional proportion. If petitioner intended to allege that respondent Gray's action was negligent, that is a state law claim that may be raised in state court.

Petitioner also raises a retaliation claim against respondent Gray. A prison official who takes action against a prisoner to retaliate against the prisoner for exercising a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. Id. To state a claim for retaliation, a prisoner need not allege a chronology of events that supports drawing an inference that the official acted in retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, he must allege sufficient facts to put the respondent on notice of the claim so that he can file an answer. Id. A prisoner satisfies this minimal requirement when he specifies the suit or complaint he filed and the act of retaliation. Id. Petitioner alleges that he filed an inmate complaint regarding his fall when respondent Gray transported him to the hospital. Petitioner argues that respondent Gray wrote an incident report against him in retaliation for his having filed an inmate complaint regarding the incident. Petitioner will be granted leave to proceed on this claim against

respondent Gray.

B. Respondent Clark

Petitioner contends that respondent Clark "repeatedly" denied him access to medical care following petitioner's return from the hospital on August 3, 2005. Deliberate indifference to prisoners' serious medical needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). To state a deliberate indifference claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. In other words, 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).

"Serious medical needs" encompass (1) conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and (3) conditions that have been "diagnosed by a physician as mandating treatment." Gutierrez, 111 F.3d at 1371-73. Petitioner alleges that he experienced pain and swelling in his back. These allegations are minimally sufficient to suggest a serious medical condition.

Gutierrez, 111 F.3d at 1372 n.7 (given liberal pleading standards for pro se complaints, "the 'seriousness' determination will often be ill-suited for resolution at the pleading stage").

To show deliberate indifference, however, petitioner must establish that a respondent 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). Although a negligent or inadvertent failure to provide adequate medical care does not amount to deliberate indifference because such a failure is not an "unnecessary and wanton infliction of pain," Estelle, 429 U.S. at 105-06, a prison official need not have intended or hoped for the harm that the inmate suffered in order to be held liable under the Eighth Amendment. Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996).

Petitioner asserts in his complaint that respondent Clark ignored his requests for medical attention on the night of August 3. However, petitioner also attached to his complaint in this court the inmate complaint he wrote the same day as well as the response he received to his complaint. These documents relate a different version of events than the version petitioner alleges here. In particular, in his inmate complaint, petitioner alleges that around 8 pm on August 3 his back pain worsened and he asked respondent Clark for permission to go to the health services unit. Although respondent Clark stated there was no need for him to go, the inmate complaint examiner found that petitioner had been seen by a nurse in the health services unit at 7:00 pm that same evening and she had prescribed an

ice bag and pain medication and scheduled an appointment for him to be seen at the health services unit again the following day.

If this version of events turns out to be true, petitioner cannot succeed on his claim that respondent Clark was deliberately indifferent to his serious medical needs when he denied petitioner's request to visit the health services unit at 8 pm on August 3. An inmate is not entitled to whatever medical care he desires and prison officials do not have to grant every request an inmate makes regarding his medical care. As long as prison officials are not deliberately indifferent to the inmate's serious medical needs, their actions pass constitutional muster. See, e.g., Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985) (state has affirmative obligation under Eighth Amendment to provide persons in custody with medical care that meets minimal standards of adequacy). In other words, even if petitioner had told respondent Clark at 8 pm on August 3 that he needed to see the medical staff immediately because his pain had worsened after he saw the nurse at 7 pm, or because he believed he had not received thorough medical care earlier in the day, he would fail to allege facts suggesting deliberate indifference to his medical needs. Under the constitution he is not entitled to immediate medical attention in the absence of a life threatening situation or a situation in which his pain was so excruciating that it was objectively unreasonable for respondent Clark to ignore it. Petitioner makes no such allegations.

Nevertheless, at this stage, I cannot assume that the factual scenario depicted in the institution complaint examiner's response to petitioner's inmate complaint is a true and accurate recitation of the facts. Therefore, instead of denying petitioner leave to proceed on his claim against respondent Clark, I will stay a decision in order to give petitioner an opportunity to advise the court (1) whether he saw a nurse at or around 7 pm following his return from the hospital; (2) whether he was given ice and pain medication; (3) whether he had an appointment scheduled to see someone in health services the following day; and (4) what facts he thinks would show that it would have been apparent to respondent Clark that petitioner faced an excessive risk to his health if Clark failed to arrange for immediate medical attention.

C. Respondent Frank

I understand petitioner to contend that the Department of Corrections practice of requiring inmates to wear ankle restraints during transport outside the prison violates his Eighth Amendment right to be free from cruel and unusual punishment. Petitioner argues that the restraints on his waist were sufficient and the restraints on his ankles were unnecessary. Petitioner contends that as Secretary of the Department of Corrections, respondent Frank "is responsible for the restraints." Although respondent Frank may be held liable in certain circumstances when the Department of Corrections implements

unconstitutional policies or practices, petitioner has not alleged facts from which an inference can be drawn that the use of waist and ankle restraints together violates his Eighth Amendment rights.

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because the Eighth Amendment draws its meaning from evolving standards of decency in a maturing society, there is no fixed standard to determine when conditions are cruel and unusual. Id. at 346. The Court of Appeals for the Seventh Circuit has cited with approval the holdings of other courts of appeals that have sanctioned the use of shackles and other forms of restraints to transport inmates outside the prison. See, e.g., Knox v. McGinnis, 998 F.2d 1405 (7th Cir. 1993) (citing Jackson v. Cain, 864 F.2d 1235, 1243-44 (5th Cir. 1989) (use of handcuffs, shackles and waist chain did not violate Eighth Amendment); Moody v. Proctor, 986 F.2d 239, 241 (8th Cir. 1993) (use of hand restraint which caused injury to inmate not cruel and unusual punishment where no evidence that defendants acted maliciously and sadistically or with deliberate indifference); Fulford v. King, 692 F.2d 11, 14-15 (5th Cir. 1982) (although restraining device caused plaintiff discomfort, its use is penologically justified "by the greater risk of escape when prisoners are outside the institution and the reduced number of guards.'")). These cases doom petitioner's claim that the manner in which he was restrained when he was transported outside the

prison violated his Eighth Amendment rights. Therefore, he will be denied leave to proceed on this claim against respondent Frank.

D. Appointment of Counsel

Petitioner filed a motion for appointment of counsel asking that an attorney be appointed to represent him in this case. Before the court can appoint counsel in a civil action such as this, it must find first that the petitioner made a reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). In this court, a petitioner must list the names and addresses of at least three lawyers who declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Petitioner does not suggest that he has made an effort to find a lawyer on his own and that his efforts have failed.

Second, the court must consider whether the petitioner is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). I cannot assess the complexity of petitioner's case until I know the claims on which petitioner will proceed. That will happen only after petitioner submits the supplemental information I have

requested with regard to his Eighth Amendment claim against respondent Clark. Also, this case is too new to allow me to assess petitioner's abilities. Therefore, petitioner's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

ORDER

IT IS ORDERED that

1. Petitioner is GRANTED leave to proceed on his claim that respondent Gray used excessive force against him in violation of the Eighth Amendment when petitioner slipped as he stepped out of the van in the hospital parking lot.

2. Petitioner is GRANTED leave to proceed on his claim that respondent Gray retaliated against him for filing an offender complaint in violation of the First Amendment.

3. Petitioner is DENIED leave to proceed on his claim that respondent Frank sanctioned the use of restraints which violated petitioner's rights under the Eighth Amendment.

4. A decision is STAYED on petitioner's claim that respondent Clark denied him access to medical care in violation of the Eighth Amendment. On or before December19, 2005, petitioner is to submit a statement clarifying the facts as instructed in this order. If, by December 19, 2005, petitioner fails to submit this statement, I will deny his request for leave to proceed on his claim that respondent Clark denied him access to medical care.

5. Petitioner's motion for appointment of counsel is DENIED without prejudice.

6. For the remainder of this lawsuit, petitioner must send respondent 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 respondents or to respondents' attorney.

7. 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.

8. The unpaid balance of petitioner's filing fee is $246.14; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

9. Service of petitioner's complaint will be delayed until a decision is reached whether petitioner may proceed on his Eighth Amendment claim against respondent Clark.

Entered this 8th day of December, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge