IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EDUARDO M. PEREZ,

ORDER

Petitioner,

05-C-711-C

v.

WIS. DOC EX-SEC. MICHAEL SULLIVAN,
WIS. DOC SECRETARY, MATTHEW FRANK,
BHS-DOC R/N SHARON ZUNKER,
BHS NURSE MRS. WENDY DE MOTTS,
in their personal and official capacities,

Respondents.

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This is a proposed civil action for monetary relief brought under 42 U.S.C. § 1983. Petitioner Eduardo Perez, an inmate at the Stanley Correctional Institution in Stanley, Wisconsin, contends that respondents violated his Eighth Amendment rights when they denied him back surgery and refused to refer him to a pain clinic.

Petitioner requests leave to proceed in forma pauperis, as authorized by 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 made the

initial partial payment required under § 1915(b)(1).[1]

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, when the litigant is a prisoner, the court must dismiss the complaint if the claims contained in it, even when read broadly, are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Petitioner will not be permitted to proceed on his claim that respondents violated his Eighth Amendment rights by denying him back surgery because he has already litigated that claim in this court. However, by alleging that respondent Zunker acted with deliberate indifference in denying him treatment for his chronic, severe pain, petitioner has stated a claim under the Eighth Amendment. He will be granted leave to proceed on that claim alone.

In his complaint, petitioner alleges the following facts.

[1]In the letter accompanying petitioner's initial partial payment, he asked the court to "straight[en] out for the record that the filing fee in this case is $150.00, not $250.00" as indicated in the court's December 14, 2005 order. The filing fee listed in the order is correct. On February 7, 2005, filing fees in federal civil cases were increased to $250.00, pursuant to amendments made to 28 U.S.C. § 1914(a).

FACTUAL ALLEGATIONS

Petitioner Eduardo Perez is an inmate at the Stanley Correctional Institution in Stanley, Wisconsin. Respondent Michael Sullivan is the former secretary of the Wisconsin Department of Corrections. Respondent Matthew Frank is the current secretary of the Wisconsin Department of Corrections. Respondent Wendy De Motts is a nurse clinician employed by the Wisconsin Department of Corrections. Respondent Sharon Zunker is the coordinator of the Department of Corrections Bureau of Health Services "R/N."

In April 1997, respondent Sullivan entered into a contract with several Texas county jails to house Wisconsin inmates. On April 27, 1997, petitioner was sent to the Bowie County Jail in Texarkana, Texas. On July 26, 1997, petitioner slipped in the shower and hurt his back as a result of the fall.

On September 10, 1997, petitioner was examined by neurosurgeon Joel Patterson. Dr. Patterson told petitioner that he needed surgery to correct the nerve root damage in his back. Dr. Patterson contacted respondent Zunker, requesting authorization to perform the surgery. The authorization was denied.

Two days later, on September 12, 1997, respondent De Motts and other Department of Corrections officials traveled to Texas to transfer petitioner back to Wisconsin. Petitioner was placed in the infirmary of the Dodge Correctional Institution in Waupun, Wisconsin, where he remained from September 12, 1997 to October 20, 1997. During that time, he

did not receive any treatment for his back injury.

On October 20, 1997, petitioner was taken to the University of Wisconsin Hospital, where he was examined by Dr. Trost, a neurologist. Dr. Trost told petitioner that his back injury would heal with time.

On November 16, 1997, petitioner was sent to the Oshkosh Correctional Institution in Oshkosh, Wisconsin, to receive treatment for his back pain. Although he was given therapy, he continued to experience a "tremendous" amount of pain on a daily basis.

On February 17, 2003, petitioner was transferred to the Stanley Correctional Institution in Stanley, Wisconsin. The drive from Oshkosh to Stanley was three hours long and the "rough transportation" on hard, plastic seats exacerbated petitioner's injury. Immediately upon arrival at the Stanley Correctional Institution, petitioner filled out a medical request form, asking to be treated for pain in his lower back, leg and foot.

On February 20, 2003, petitioner was seen by Nurse Mrs. Kathy, who referred his request for treatment to Dr. Heidor. On March 2, Dr. Heidor examined petitioner and ordered X-rays of his spine. The X-rays revealed that petitioner was suffering from a degenerative disk disease.

In October 2003, petitioner was taken to "UW-Health" and given an MRI, which revealed "left central disk protrusion at L-4-5 which abuts the L-5 nerve roots [and was causing] mild left lateral recess narrowing." On January 1, 2004, petitioner was seen by

neurosurgeon Brian Witwer, who later provided petitioner with a nerve root block.

On March 10, 2004, petitioner again saw Dr. Witwer, who informed him that nothing could be done to correct his back problems surgically. According to Dr. Witwer, because petitioner had not been given surgery at an earlier date, he had developed chronic arthritis. Dr. Witwer referred petitioner to the UW-Health Pain Clinic.

On May 2, 2004, petitioner was taken to the pain clinic for an appointment, but the appointment was cancelled. Although petitioner has requested a rescheduled appointment more than 100 times, he has still not been taken to the pain clinic.

After having been without a staff physician for more than a year, the Stanley Correctional Institution hired Dr. Gerlenger. Petitioner met with Dr. Gerlanger on August 1, 2005. Dr. Gerlanger agreed to refer petitioner for an appointment with the pain clinic. On August 3, 2005, petitioner sent a medical request to the health services unit to find out whether an appointment had been scheduled. No appointment had been made.

In September, petitioner repeated the same process. On September 1, 2005, he met with Dr. Gerlanger to ask why no pain clinic appointment had been scheduled. Dr. Gerlanger told petitioner that Mrs. Brenda, the employee who schedules medical appointments, had been on vacation. Dr. Gerlanger promised petitioner he would again refer petitioner for an appointment with the pain clinic. On September 2, 2005, and September 6, 2005, petitioner sent medical requests to the health services unit to find out

whether an appointment had been scheduled for him at the pain clinic. Again, he was told that no appointment had been made.

Petitioner has been in pain for eight years. As a result of the pain, he suffers from loss of motor function in his left leg, loss of reflexes below the level of his injury on his left leg, loss of tone in his lower body, high blood pressure, mental anguish and depression and difficulty walking, sitting and sleeping.

On September 12, 2005, petitioner filed inmate complaint number SCI-2005-28091, contending that prison officials were being deliberately indifferent to his need for medical treatment. Respondent Zunker recommended that the complaint be dismissed. Petitioner appealed the dismissal, but was denied relief.

DISCUSSION

Petitioner contends that respondents violated his Eighth Amendment rights by refusing to (1) authorize surgery following his July 1997 back injury and (2) reschedule his medical appointment with the UW-Health Pain Clinic.

A. Failure to Provide Back Surgery

First, petitioner contends that respondents Sullivan, De Motts and Zunker violated his rights under the Eighth Amendment when they refused to provide him with surgery

following his July 1997 back injury. Petitioner will be denied leave to proceed on this claim because it is barred under the doctrine of claim preclusion.

Under the federal common law of claim preclusion, a lawsuit cannot be litigated if the claim upon which it is based arises from the "same incident, events, transaction, circumstances, or other factual nebula" as a prior suit that has gone to final judgment. Okoro v. Bohman, 164 F.3d 1059, 1062 (7th Cir. 1999). "For claim preclusion to apply there must be a final judgment on the merits in an earlier action, an identity of the cause of action in both suits, and an identity of parties or privies in the two suits." Wilhelm v. County of Milwaukee, 325 F.3d 843, 846 (7th Cir. 2003) (citing Shaver v. F.W. Woolworth Co., 840 F.2d 1361 (7th Cir. 1988)). Claim preclusion "does not require identity of legal theory or of facts." Okoro, 164 F.3d at 1062.

In the present case, petitioner contends that respondents Sullivan, De Motts and Zunker violated his Eighth Amendment rights by failing to provide him with back surgery following his July 1997 injury. In Perez v. Sullivan, Case No. 01-C-519-C, petitioner litigated an identical claim against respondents Sullivan, De Motts and Zunker, contending that they violated his Eighth Amendment rights by failing to provide him with back surgery following his July 1997 injury. In an order dated April 30, 2002, I granted summary judgment to the defendants after finding that "no reasonable jury could conclude that defendants were deliberately indifference to plaintiff's serious medical need." Perez v.

Sullivan, Case No. 01-C-519-C, dkt. #45, at 2. The Court of Appeals for the Seventh Circuit affirmed that decision on November 21, 2002. Perez v. Sullivan, 52 Fed. Appx. 275 (7th Cir. 2002) (unpublished decision).

Petitioner's deliberate indifference claim regarding his lack of surgery is therefore barred because it meets all three requirements for claim preclusion: the parties in both lawsuits are identical, there was a final judgment in the prior lawsuit and the two suits involve the same cause of action. Accordingly, petitioner will be denied leave to proceed on this claim.

B. Failure to Refer Petitioner to Pain Clinic

Next, petitioner contends that respondent Zunker violated his Eighth Amendment rights when she ignored his request for treatment at the UW-Health Pain Clinic. Because plaintiff has alleged facts from which it can be inferred that defendant Zunker was deliberately indifferent to his serious medical needs, he will be granted leave to proceed on this claim.

The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." Farmer v. Brennan, 511 U.S. 825, 832 (1994). As long as conditions do not fall below contemporary standards of decency, they are not unconstitutional. Id. With respect to

medical care, the Eighth Amendment is violated only when prison officials are deliberately indifferent to inmate health or safety. Farmer, 511 U.S. at 834. The Supreme Court has said that in the context of prisoner litigation, "deliberate indifference" means that an official (1) was aware of facts that could lead to the conclusion that a prisoner was at substantial risk of serious harm and (2) actually came to the conclusion that the prisoner was at substantial risk of serious harm. Id. at 837. Under this legal standard, it is not enough that an official "should have known" of a risk to petitioner. Rather, the official must actually know of a risk and consciously choose to disregard it. Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508, 511 (7th Cir. 1999).

The Court of Appeals for the Seventh Circuit has defined "serious medical needs" as conditions that carry risks of permanent impairment or death if left untreated and those in which the withholding of medical care results in needless pain and suffering. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Petitioner has alleged sufficient facts to suggest that respondent Zunker has been deliberately indifferent to his serious need for pain management. Petitioner contends that the pain caused by his back injury impairs his ability to walk, sleep, and sit and has resulted in mental anguish and depression. In other words, he has alleged a serious medical need. Also, petitioner alleges that respondent Zunker has been aware of his injury since July 1997 and has done nothing to insure that he sees a physician at the pain clinic, despite the fact that he has been referred to the clinic by two

doctors on at least three occasions over a period of seventeen months. According to petitioner, respondent Zunker has offered no legitimate reason for the delay. From these alleged facts, it can be inferred that defendant Zunker knew petitioner was at risk of needless suffering and knowingly chose to delay his receipt of necessary medical care. Therefore, I will allow petitioner to proceed on his claim that his Eighth Amendment rights were violated when respondent Zunker ignored his request for treatment at the UW-Health Pain Clinic.

C. Liability of Defendant Frank

It is well established that liability under § 1983 must be based on a defendant's personal involvement in a 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). In an action under § 1983 there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Gentry, 65 F.3d at 561.

Petitioner has not alleged that respondent Frank was personally involved in denying him an appointment with the UW-Health Pain Clinic. In fact, petitioner has neither alleged that respondent Frank has had any knowledge of petitioner's medical situation nor suggested any reason to believe Frank would have such knowledge. Therefore, respondent Frank will be dismissed from this lawsuit.

ORDER

IT IS ORDERED that the request of petitioner Eduardo Perez for leave to proceed in forma pauperis is

1. GRANTED on his claim that respondent Zunker was deliberately indifferent to his serious medical needs when she ignored his request for treatment at the UW-Health Pain Clinic; and

2. DENIED on his claim that respondents Sullivan, Zunker and De Motts were deliberately indifferent to his serious medical needs when they denied him surgery following his July 1997 back injury.

FURTHER, IT IS ORDERED that

3. Respondents Sullivan, Frank and De Motts are dismissed from this lawsuit.

4. 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 respondent Zunker, he should serve the lawyer directly rather than respondent. 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.

5. 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.

6. The unpaid balance of petitioner's filing fee is $243.29; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on respondent.

8. Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. Those papers are not considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event respondent wishes to examine them.

Entered this 3rd day of January, 2006.

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