IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WARREN GAMEAL LILLY, JR.,

Petitioner,

v.

ALLAN B. TORHORST, Circuit Judge, Racine County; QUALA CHAMPAGNE, Warden, Racine Correctional Institution; RONALD MOLNAR, Security Director; MANUEL JOSEPH, Physician; SUE NYGREN, Nursing Supervisor; BRENDA LABELLE, Institution Complaint Examiner; JAMES LABELLE, Authorized Reviewing Authority; LANCE LUEDTKE, Crisis Worker; JAMES GREER, Director, Bureau of Health Services; DR. DAVID BURNETT, Medical Director; REGIONAL NURSING DIRECTOR (NAME NOT KNOWN); KEVIN POTTER, Chief Legal Counsel, WI Department of Corrections; TIMOTHY CORRELL, Physician, Dodge Correctional Institution; THOMAS WILLIAMS, Physician; SCOTT HOFTIEZER, Physician; BETH DITTMAN, Health Services Unit Manager; CATHY JESS, Warden; ANN KRUEGER, Legal Officer; JOANNE BOVEE, Institution Complaint Examiner; and MARGIE BARNES, Medical Social Worker,

Respondents.

OPINION AND ORDER

06-C-008-C

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This is a proposed civil action for injunctive and 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.

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). 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 contends that respondents violated his Fourteenth Amendment right to refuse medical treatment when they (1) fed him against his will pursuant to a falsified court

order; (2) failed to prevent the continued use of a falsified court order; (3) conspired to use a falsified court order to feed petitioner by force; and (4) rejected or dismissed petitioner's offender complaints concerning the falsified court orders. Petitioner contends also that respondents violated his right to medical care under the Eighth Amendment when they refused to feed him and when they force fed him under inadequate medical conditions. Also, petitioner contends that respondents violated his Eighth Amendment rights to be free from excessive force and from cruel and unusual conditions of confinement. Last, petitioner contends that respondents violated his rights under state law when (1) respondents failed to follow Department of Corrections rules for obtaining a court order; (2) respondents conspired to produce false documents in response to petitioner's request for court documents under Wisconsin's Open Records Law; and (3) respondent Torhorst ordered court staff to disregard petitioner's request for documents under the Open Records Law.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Warren G. Lilly, Jr. is a Wisconsin state inmate housed at the Dodge Correctional Institution in Waupun, Wisconsin. Respondent Allan B. Torhorst is a judge in the Circuit Court for Racine County. The following respondents are employed at the Racine Correctional Institution: respondent Quala Champagne is the warden; respondent

Ronald Molnar is the security director; respondent Manuel Joseph is a physician; respondent Sue Nygren is the nursing supervisor; respondent Brenda Labelle is an institution complaint examiner; respondent James Labelle is an authorized reviewing authority; and respondent Lance Luedtke is a crisis worker. The following respondents are employed at the Dodge Correctional Institution: respondents Timothy Correll, Thomas Williams and Scott Hoftiezer are physicians; respondent Beth Dittman is manager of the health services unit; respondent Cathy Jess is the warden; respondent Ann Krueger is a legal officer; respondent Joanne Bovee is an institution complaint examiner; and respondent Margie Barnes is a medical social worker. The following respondents are employed at the Bureau of Health Services of the Wisconsin Department of Corrections: respondent James Greer is the director; respondent David Burnett is the medical director; and an unnamed respondent is the regional nursing director. Respondent Kevin Potter is the chief legal counsel for the Wisconsin Department of Corrections.

A. Court Order

Petitioner has been on a hunger strike to protest the use of imprisonment as a solution to social conflicts since May 2004. Since February 2005 petitioner has refused all food and water and respondents have fed him by force.

Respondents entered into a conspiracy to use a falsified court document in order to

force feed petitioner. Each respondent saw the falsified court order. Also, petitioner told each of the respondents, either in a memorandum, offender complaint or personal conversation that the court order was falsified. The deficiencies in the falsified court order were obvious and anyone would have questioned its authenticity. Respondents failed to do anything to stop the use of the fraudulent court order.

Petitioner has appended to his proposed complaint a copy of the court order, dated May 28, 2004, and signed by The Honorable Allan Torhorst. The order bears the seal of the Circuit Court for Racine County and states:

> IT IS ORDERED THAT any licensed physician, or a person acting under his or her direction and control, may evaluate, and provide to Warren Lilly Jr., by force or otherwise, feeding or hydration, or both, which in his or her medical judgment is necessary to protect and maintain the health of Warren Lilly Jr., while he remains in the legal custody of the Department of Corrections.

The Department of Corrections has rules establishing procedures to be used concerning prisoners who refuse to eat. Respondents did not follow these rules because they did not prepare an incident report, did not provide daily reports to the warden and chief legal officer and did not produce affidavits for the court. None of these background materials and supporting documents were filed in the Circuit Court for Racine County (in his complaint, petitioner incorrectly identified the court as the Circuit Court for Dane County).

Sometime after May 28, 2004, petitioner made a request for court documents related

to the court order. Respondent Torhorst ignored plaintiff's repeated requests for information. Respondent Torhorst steered plaintiff away from information that was publicly available in the court and ordered court staff to discontinue the search that plaintiff had requested and paid for. Instead, in response to petitioner's request, respondents conspired to produce falsified documents to lead plaintiff to believe the validity of the court order.

Respondents never obtained a valid court order to force feed petitioner and did not treat petitioner even though he had refused food for longer than deemed reasonable by the Bureau of Health Services.

B. Forced Feeding

Prior to being placed at the Dodge Correctional Institution, petitioner was incarcerated at the Racine Correctional Institution. While he was in the Racine facility, certain respondents injured, manhandled, chained and confined petitioner in a cold, glass cage for thirty-six days of forced feeding.

Respondents directed untrained, unqualified and unsupervised medical staff to perform the forced feedings, which entailed an invasive medical procedure. Respondents allowed the participation of non-medical staff in the performance of the forced feedings. The forced feedings took place in a location that was not suitable for medical purposes. The forced feedings caused injury to petitioner. Respondents used an "inappropriate nutrient

as a tube feeding supplement."

Respondents did not force feed petitioner between February 17 and 28, 2005 (when petitioner was incarcerated at the Racine Correctional Institution), and between April 19 and 29, 2005 (when petitioner was incarcerated at the Dodge Correctional Institution). This was an attempt by respondents "to starve a hunger striking prisoner off a hunger strike by withholding force feeding."

C. Offender Complaints

On March 10, 2005, petitioner filed an offender complaint stating that he was being fed against his will and demanding that the feedings be stopped. On March 22, 2005, the institution complaint examiner, Jennifer Mikutis, recommended dismissing petitioner's complaint, explaining that the feedings were administered pursuant to a court order issued in May 2004. The following day respondent James Labelle, the complaint reviewer, adopted Mikutis' recommendation and dismissed petitioner's complaint.

Some time prior to March 25, 2005, petitioner filed another offender complaint stating that the tube feedings had caused him pain. (Although petitioner has not submitted a copy of this offender complaint, I can infer that he filed it because he submitted a "receipt" from the institution complaint examiner dated March 25, 2005, acknowledging receipt of such a complaint.) Institution complaint examiner Mikutis rejected petitioner's offender

complaint because "the complainant has since been transferred to another institution and is no longer affected by staff actions or living conditions of this institution. This complaint is deemed to be moot and is hereby rejected." Petitioner appealed the rejection of his offender complaint on March 31, 2005. On April 15, 2005, the complaint examiner, respondent Champagne, issued a response, stating "This complaint was appropriately rejected by the ICE in accordance with DOC 310.11(5)."

On March 21, 2005, petitioner filed another offender complaint stating that he was being fed against his will and demanding that the feedings be stopped. On March 29, 2005, the institution complaint examiner, Joanne Bovee, rejected petitioner's complaint, stating that "The issue raised in this complaint has been addressed through the inmate's prior [offender complaint dated March 10, 2005] (DOC 310.11(5)(g), Wis. Adm. Code)." On April 4, 2005, the complaint reviewer, Cathy Jess, stated that "This complaint was appropriately rejected by the ICE in accordance with DOC 310.11(5)."

OPINION

A. Respondent Torhorst

Petitioner contends that respondent Torhorst participated in a conspiracy to use a falsified court order to force feed him and failed to act to prevent the continued use of what respondent Torhorst knew was a falsified court order. The contentions are inconsistent on

their face. If respondent Torhorst signed the order, how can it be said to have been falsified? Petitioner does not say that respondent Torhorst signed the order without having heard sufficient evidence or otherwise acted improperly in deciding to issue the order, only that it was "falsified," presumably meaning that the order was not a real one signed by a judge. If respondent Torhorst did sign the order, he was acting in the course of a judicial proceeding when he committed the alleged misdeeds and he has absolute immunity from liability for his judicial acts. See, e.g., Mireles v. Waco, 502 U.S. 9 (1991) (judges have absolute immunity from liability for their judicial acts, even when the judge acts maliciously or corruptly). Even if petitioner is saying that respondent Torhorst signed the order without having heard sufficient evidence (petitioner alleges that respondents at Racine Correctional Institution failed to prepare the background reports and documentation allegedly required to obtain such a court order), respondent Torhorst is entitled to absolute immunity for his judicial decisions. Therefore, petitioner will be denied leave to proceed against respondent Torhorst.

B. Forced Feedings

Inmates have the right to refuse medical treatment under the Fourteenth Amendment. See, e.g., Russell v. Richards, 384 F.3d 444 (7th Cir. 2004). However, prison administrators and courts will sometimes intervene in an inmate's decision to refuse treatment in order to

ensure the inmate's safety. See, e.g., Washington v. Harper, 494 U.S. 210 (1990). Petitioner contends that respondents violated his Fourteenth Amendment right to refuse medical treatment by (1) entering into a conspiracy to use a falsified court order to force feed him; (2) force feeding him in reliance on a falsified court order; and (3) failing to act to prevent the continued use of what respondents knew was a falsified court order. Petitioner will be denied leave to proceed on these claims because the copy of the court order that petitioner submitted with his complaint nullifies petitioner's contention that the court order was falsified.

Despite petitioner's assertion that "[e]ven to a casual observer the obvious deficiencies of the proffered order call into question its authenticity" (Ptr.'s Cpt., dkt. #2, at 4.4), the court order actually appears to be flawless. Nothing on its face renders its authenticity questionable. Petitioner contends that he informed respondents that the court order was falsified but respondents continue to condone its use. However, in the same way that an officer executing an apparently valid arrest warrant is not liable under § 1983, Patton v. Przybylski, 822 F.2d 697, 699 (7th Cir. 1987), respondents would not be liable for relying on an apparently valid court order to administer medical treatment. In the absence of facts to support petitioner's bald speculation that the order was falsified, I will not grant petitioner leave to proceed on his claims that are predicated on the assumption that the order was falsified.

C. Offender Complaints

Petitioner contends that respondents Champagne, Jess, Brenda Labelle, James Labelle and Bovee, in their capacities as institution complaint examiners and reviewers, "quash[ed] plaintiff's complaints concerning force feeding via the use of known falsified court documents." Petitioner has not introduced any facts suggesting that Brenda Labelle was involved in the resolution of any of his offender complaints and therefore he cannot proceed on this claim against her. As for respondents Champagne, Jess, James Labelle and Bovee, each of them either dismissed, rejected, or affirmed the rejection of one of petitioner's offender complaints that petitioner was being fed against his will and that the feedings caused him pain.

It is well established that liability under § 1983 must be based on a respondent's personal involvement in the constitutional violation. See, e.g., Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). In order to satisfy the personal involvement requirement, a petitioner need not allege direct participation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2002). However, he must allege that the respondent knew about the violation and facilitated it, approved it, condoned it or turned a blind eye for fear of what he or she might see. Morfin v. City of

Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). The Court of Appeals for the Seventh Circuit has held that a prison official may be held liable for a constitutional violation if he knew about it and had the ability to intervene but failed to do so. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). However, this rule "is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees." Windle v. City of Marion, Ind., 321 F.3d 658, 663 (7th Cir. 2003). The court of appeals has made it clear that in order to succeed on a failure to intervene theory, a complainant must prove that the government employee failed to intervene with deliberate or reckless disregard for the complainant's constitutional right. Fillmore, 358 F.3d at 505-06. If inmate complaint examiners have authority to find in favor of an inmate on the ground that they believe a regulation or practice is unconstitutional, this might be sufficient to satisfy the personal involvement requirement.

Respondents James Labelle, Bovee and Jess either dismissed or rejected petitioner's offender complaints of March 10 and March 21, 2005, wherein petitioner complained that he was being fed against his will. In so doing, respondents James Labelle, Bovee and Jess did not violate petitioner's constitutional rights. They were not facilitating, approving or condoning a violation of petitioner's constitutional rights. These respondents dismissed or rejected petitioner's offender complaints on the ground that petitioner was being fed pursuant to a court order. As I have discussed above, nothing suggests the court order was

falsified or that there was any reason for respondents James Labelle, Bovee and Jess to believe the court order was falsified.

Respondent Champagne affirmed the rejection of petitioner's offender complaint wherein petitioner contended that the feedings in the Racine facility had caused him pain. This complaint was rejected because petitioner had been transferred to another institution and was no longer being fed by the staff at the Racine facility. When respondent Champagne affirmed the rejection of petitioner's offender complaint, she did not violate petitioner's constitutional rights because in so doing she did not facilitate, approve or condone the infliction of pain upon petitioner. By the time this matter came before respondent Champagne, the alleged misdeeds that caused petitioner pain had already occurred and petitioner was no longer at the facility and no longer exposed to the infliction of pain by staff at the Racine facility.

Because I conclude that respondents Champagne, Jess, James Labelle and Bovee did not participate in depriving petitioner of his constitutional rights when they dismissed or rejected his offender complaints, petitioner will not be allowed to proceed against them.

D. Deliberate Indifference

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.

To show deliberate indifference, 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 or dental 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).

1. Failure to feed

After having complained that respondents fed him by force using a falsified court order, petitioner complains also that respondents failed to obtain a valid court order and failed to feed him by force even though he had deprived himself of food for several days ("[F]ailed to treat or order the treatment of [petitioner] who had refused food beyond the limit set by the Bureau of Health Services." Ptr.'s Cpt., dkt. #2, at 3.8). According to petitioner, this alleged failure to treat petitioner was an attempt by respondents to "starve a hunger striking prisoner off a hunger strike." (Ptr.'s Cpt., dkt. #2, at 3.12). This allegation is senseless and legally meritless and does not state an Eighth Amendment claim because the facts do not suggest petitioner had a serious medical need. A voluntary hunger strike alone does not rise to the level of a serious medical need for Eighth Amendment purposes as long as it remains within petitioner's power to end the strike. If a prisoner were to fall into a coma as the result of a hunger strike and prison officials were to refuse medical attention recommended to save the prisoner's life, this might constitute deliberate indifference to a serious medical condition. However, petitioner has not alleged such facts. Therefore, petitioner will not be granted leave to proceed on his claim that respondents' failure to feed him by force amounted to a denial of medical treatment.

2. Feeding procedure

Petitioner contends that respondents acted with deliberate indifference when they allowed the administration of feedings by medical staff that was unqualified, using the assistance of non-medical staff and in an inappropriate location, all of which caused petitioner physical injury. Petitioner contends that the location was inappropriate because it "lacked emergency medical equipment and lacked access to physician staff." Also, petitioner contends that respondents used "an inappropriate nutrient as a tube feeding supplement."

Although, as discussed above, petitioner does not have a right to forced feedings, if prison officials decide to administer treatment, they must do so in compliance with the requirements of the Eighth Amendment. However, the Eighth Amendment does not entitle petitioner to the medical care of his choice. Indeed, it is not constitutionally required that a prisoner's health care be "'perfect, the best obtainable, or even very good.'" Harris v. Thigpen, 941 F.2d 1495, 1510 (11th Cir. 1991) (quoting Brown v. Beck, 481 F. Supp. 723, 726 (S.D. Ga. 1980)); 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). Although his medical care may not have met petitioner's expectations, the things petitioner complains about (the medical staff was not trained to his satisfaction and relied on assistance from non-medical staff, the procedure

was conducted in an inappropriate room and the nutrient was inadequate) are not things to which he is entitled. Petitioner has not alleged facts suggesting that respondents treated him with deliberate indifference.

Even if petitioner could show that respondents made bad medical decisions in the course of his feedings, 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. Negligence claims are the province of state law and can be pursued in state court if petitioner desires. Petitioner will not be granted leave to proceed on his claim that respondents administered the feedings in violation of the Eighth Amendment.

E. Excessive Force and Cruel and Unusual Conditions

Petitioner contends that respondents at the Racine Correctional Institution ordered prison guards to "manhandle, chain and confine petitioner to a cold, glass cage for 36 days, under the euphemistic guise of medical observation." Although petitioner has not stated so, his complaint appears to be that respondents' actions violated his Eighth Amendment rights to be free from excessive force and cruel and unusual conditions of confinement.

Petitioner's allegation that respondents manhandled and chained him (or ordered that he be manhandled and chained) does not make out an excessive force claim. The law

governing this kind of Eighth Amendment claim is well settled. The question to be resolved is whether respondents' use of force was applied in a good faith effort to maintain or restore discipline, or maliciously or sadistically to cause harm. Hudson v. McMillian, 503 U.S. 1, 6 (1992). Given that petitioner refused to be fed, it is not surprising that respondents would have needed to use some force to restrain him. Petitioner has not alleged facts suggesting that respondents used more force than necessary under the circumstances or acted maliciously or sadistically to cause him harm. Therefore, petitioner will not be granted leave to proceed on his claim that respondents used excessive force against him in violation of the Eighth Amendment.

Petitioner's contention that he was placed in a "cold, glass cage" for 36 days does not state a claim that he was exposed to cruel and unusual conditions of confinement. In order to state a claim under the Eighth Amendment, petitioner's allegations about prison conditions must satisfy a test that involves both a subjective and objective component. Farmer v. Brennan, 511 U.S. 825, 834 (1994). The objective component focuses on whether the conditions "exceeded contemporary bounds of decency of a mature, civilized society." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994) (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)). The subjective component focuses on intent: "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d at 1579.

The Eighth Amendment duty of prison officials to provide adequate shelter acknowledges the possibility that conditions may be harsh and uncomfortable. See, e.g., Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997). In order to violate the Eighth Amendment, deprivations must be "unquestioned and serious" and contrary to "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Although petitioner suggests that being in a "cold, glass cage" for 36 days was harsh and uncomfortable, his allegations do not suggest that the conditions at the institution violated "contemporary standards of decency," Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986), or deprived him of "the minimal civilized measure of life's necessities." Rhodes, 452 U.S. at 347. Therefore, petitioner will not be granted leave to proceed on his claim that respondents exposed him to cruel and unusual conditions of confinement in violation of the Eighth Amendment.

F. State Law Claims

Petitioner has asserted three claims under state law. First, petitioner contends that respondents violated Department of Corrections rules when they failed to follow procedures to obtain a court order and conspired to use a false court order to feed petitioner. Second, petitioner contends that respondents conspired to produce additional falsified documents in violation of the Open Records Law, Wis. Stat. § 19.31. Third, petitioner contends that

respondent Torhorst ordered court staff to disregard petitioner's document request in violation of Wis. Stat. § 19.31.

Because I am denying petitioner leave to proceed on his federal claims regarding the forced feedings, I will decline to exercise supplemental jurisdiction over his state law claims. If petitioner wishes to pursue these claims, he may do so in state court. However, petitioner should note that his claims against respondent Torhorst may be barred by the doctrine of judicial immunity. Although it is not clear from petitioner's complaint what kind of proceeding his request for court documents entailed and what respondent Torhorst's alleged misdeeds consisted of, to the extent that respondent Torhorst was acting in the course of a judicial proceeding, he has absolute immunity from liability for his judicial acts. Mireles, 502 U.S. 9.

ORDER

IT IS ORDERED that

1. Petitioner Warren G. Lilly, Jr.'s request for leave to proceed in forma pauperis on his claims against respondents is DENIED because his claims of constitutional wrongdoing are legally meritless;

2. I decline to exercise supplemental jurisdiction over petitioner's state law claims;

3. The unpaid balance of petitioner's filing fee is $250; petitioner is obligated to pay

this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will not be recorded against petitioner Warren Lilly, Jr. because I am declining to exercise supplemental jurisdiction over his state law claims; thus I did not dismiss the action for one of the reasons set forth in 28 U. S.C. § 1915(g); and

5. The clerk of court is directed to close the file.

Entered this 13th day of February, 2006.

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