IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JOSEPH VAN PATTEN,

Petitioner, OPINION and ORDER

v. 06-C-374-C

D.O.C., MATTHEW FRANK,
MORAINE PARK TECHNICAL COLLEGE,
JOHN DOE, JOSEPH LADWIG, WARDEN
DEPPISCH, DR. LUY and BUREAU OF
HEALTH SERVICES,

Respondents.

- -

In this proposed civil action for monetary relief, petitioner Joseph Van Patten, a prisoner at the Shawano County Jail in Shawano, Wisconsin and a former prisoner of the Fox Lake Correctional Institution in Fox Lake, Wisconsin, contends that respondents Department of Corrections, Matthew Frank, Warden Deppisch, Dr. Luy and Bureau of Health Service violated his rights under the Eighth Amendment by exhibiting deliberate indifference to his serious medical needs by failing to properly treat his broken leg for a period of nine months. In addition, petitioner contends that respondents Moraine Park Technical College and Joseph Ladwig negligently caused him injury when the college used

a faulty holding cart in the room where welding classes were conducted and when Ladwig forced petitioner to walk half a mile on a broken leg in order to seek medical treatment for an injury that occurred in Ladwig's class.

Petitioner requests leave to proceed in forma pauperis, as authorized by 28 U.S.C. § 1915. In an order dated August 7, 2006, I concluded that petitioner was unable to prepay the full fees and costs of starting this lawsuit, and assessed him an initial partial payment of $23.96 under § 1915(b)(1). When he did not pay by the deadline I imposed, the case was closed. Now, because petitioner has submitted a check for $23.96 which he intends as an initial partial payment of the filing fee in this case, I will reopen the case and proceed to screen it as required by 28 U.S.C. § 1915(e)(2).

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. § 1915(e)(2).

Because petitioner has alleged facts from which it may be inferred that respondents Luy, Deppisch and Frank exhibited deliberate indifference to his serious medical needs by ignoring his need for appropriate treatment of his broken leg, his request for leave to proceed

against these respondents will be granted. In addition, petitioner will be granted leave to proceed on his claim that respondent Ladwig exhibited deliberate indifference to his serious medical needs when Ladwig forced him to walk unassisted for half a mile in order to obtain medical treatment for his broken leg. However, petitioner will be denied leave to proceed against the Wisconsin Department of Corrections and the Bureau of Prison Health Services, because these entities are not suable persons under 42 U.S.C. § 1983. Finally, I will decline to exercise jurisdiction over petitioner's claim that respondents Ladwig and Moraine Park Technical College acted negligently by failing to properly maintain the holding cart used in prison's welding room.

I draw the following facts from petitioner's complaint and the documents attached to it.

ALLEGATIONS OF FACT

A. Parties

Petitioner Joseph Van Patten is an inmate at the Shawano County Jail. At all times relevant to this lawsuit, petitioner was incarcerated at the Fox Lake Correctional Institution in Fox Lake, Wisconsin.

Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Respondent Moraine Park Technical College is a technical college that offers welding

classes to inmates of the Fox Lake Correctional Institution.

Respondent Joseph Ladwig is a welding instructor employed by respondent Moraine Park Technical College.

Respondent Warden Deppisch is warden of the Fox Lake Correctional Institution in Fox Lake, Wisconsin.

Respondent Dr. Luy is a physician at the Fox Lake Correctional Institution.

Respondent Bureau of Health Services is a bureau of the Wisconsin Department of Corrections responsible for providing health care to prison inmates.

B. Injury and Medical Treatment

On December 7, 2004, while incarcerated at the Fox Lake Correctional Institution, petitioner attended a welding class sponsored by respondent Moraine Park Technical College. The instructor, respondent Ladwig, ordered petitioner and another inmate to grab a sheet of metal measuring 4' x 8' x 3/16" from a "homemade" cart that was holding approximately 1 ton of assorted sheet metal. As petitioner and the other inmate were preparing to lift the piece of metal from the cart, the entire load of metal fell on petitioner, "pinning" him between a pick-up truck and the pile of fallen metal, breaking his right leg and injuring both his knees and his lower back.

Although petitioner's leg was broken, respondent Ladwig forced him to walk

unaccompanied for half a mile to the prison health services unit in order to receive medical assistance. When petitioner arrived at the health services unit, his leg was wrapped in an Ace bandage. Afterward, he was directed to walk to his living unit and to return the following day for X-rays.

When petitioner returned to health services, respondent Luy placed petitioner's leg in a cast. However, Luy removed the cast two and a half weeks later, before the break had healed fully. After nine months of requesting assistance from respondents Deppisch, Frank and the Madison office of the Bureau of Prison Health Services, petitioner succeeded in convincing the health services director that his leg remained broken. He underwent surgery and had two pins placed in his right leg to stabilize the break.

Petitioner endures chronic pain in his right leg, knees and lower back as a result of the injury.

DISCUSSION

A. Proper Respondents to Claim Under 42 U.S.C. § 1983

Petitioner has named eight respondents to his lawsuit: the Wisconsin Department of Corrections, Matthew Frank, the Moraine Park Technical College, John Doe, Joseph Ladwig, Warden Deppisch, Dr. Luy and the Bureau of Prison Health Services. Liability under § 1983 attaches to persons who "under color of any statute, ordinance, regulation,

custom, or usage" of state power deprive a citizen of any right under the Constitution or federal law. In order to qualify as a state actor, a "person" must be clothed with the authority of the state. Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 315 (1913). Respondents Frank, Deppisch and Luy qualify as state actors suable under § 1983 because they are employed by the Wisconsin Department of Corrections and the actions they are alleged to have taken (and not taken) occurred in connection with their authority as prison officials.

Respondents Wisconsin Department of Corrections and Bureau of Prison Health Services are not persons. The department is a state agency, and the bureau is a subdivision of the department. The Eleventh Amendment of the United States Constitution bars federal lawsuits brought against states for money damages, Wynn v. Southward, 251 F.3d 588, 592 (7th Cir. 2001), and for the purpose of preserving state sovereign immunity, state agencies are entitled to sovereign immunity and are not subject to liability under 42 U.S.C. § 1983, Kroll v. Board of Trustees of Univ. of Illinois, 934 F.2d 904 (7th Cir. 1991) ("[A] state agency is the state for purposes of the eleventh amendment."). Consequently, defendants Wisconsin Department of Corrections and Bureau of Prison Health Services are not proper respondents to petitioner's § 1983 claims.

Respondent Moraine Park Technical College's alleged connection to this lawsuit is through its role as respondent Ladwig's employer and as sponsor of the welding class.

Liability under § 1983 arises only through 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. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-695 (1978); Gentry, 65 F.3d at 561. Because respondent Ladwig's alleged violation of plaintiff's Eighth Amendment rights may not be imputed to respondent Moraine Park Technical College, the college is not a proper defendant to petitioner's § 1983 claims.

That leaves respondent Ladwig. For an individual's action to be attributable to the state, "the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." West v. Atkins, 487 U.S. 42, 49-50 (1988). In limited circumstances, private actors may qualify as state actors if they perform tasks on behalf of the government that are "traditionally and exclusively" the government's responsibility. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974); Reasonover v. St. Louis County, Mo., 447 F.3d 569, 584 (8th Cir. 2006). As an example, doctors or health service corporations contracted by a prison to provide medical services to prisoners may be considered state actors for the purpose of establishing liability

under § 1983. West, 487 U.S. at 56. Courts have adopted many tests for determining when private action can be attributed to the state. These include the "public function" test, Terry v. Adams, 345 U.S. 461 (1953); the "state compulsion" test, Adickes v. S. H. Kress & Co., 398 U.S. at 170; and the "nexus" test, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 939 (1982). Regardless which test is employed, the determination whether a person is a state actor is fact-intensive and not amenable to resolution on the meager facts petitioner has pleaded here. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

Petitioner alleges that he was seriously injured while attending a welding class offered by the Moraine Park Technical College and taught by respondent Ladwig on the premises of the Fox Lake Correctional Institution. It is not clear whether the technical college contracted with the state to make vocational training available to state inmates or whether the course was offered independently by the technical college. Without more information, it is impossible to say whether respondent Ladwig qualifies as a state actor, who may be held responsible under § 1983 for his alleged deliberate indifference to petitioner's need for medical care following petitioner's injury. Nevertheless, making all inferences in petitioner's favor, I will assume for now that respondent Ladwig may qualify as a state actor and

therefore is a proper respondent to petitioner's Eighth Amendment claim against him.

B. Eighth Amendment

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, 103 (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 and that prison officials were deliberately indifferent to that need. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). "Serious medical needs" encompass (1) conditions that are life-threatening or that carry risk 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.

Deliberate indifference requires that a prison official "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and actually "draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Medical malpractice alone is not equivalent to deliberate indifference. Vance v. Peters, 97 F.3d 987, 992 (7th

Cir. 1996); see also Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Deliberate indifference is evidenced by a defendant's actual intent or reckless disregard for a prisoner's health or safety, and must amount to highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Petitioner alleges that after his leg was broken by the collapse of a cart holding one ton of sheet metal, respondent Ladwig forced him to walk half a mile, unaccompanied, in order to seek medical treatment from the prison health services unit. Assuming the extent of petitioner's injury was apparent, it is possible to infer from these facts that respondent Ladwig's conduct amounted to a "gross departure from [the] ordinary care" a reasonable person would show under the circumstances. Benson, 761 F.2d at 339. Consequently, petitioner will be granted leave to proceed on his claim that respondent Ladwig exhibited deliberate indifference to his medical needs following his injury on December 7, 2004.

Next, petitioner contends that respondent Luy exhibited deliberate indifference to his broken leg when he removed plaintiff's cast before petitioner's break had healed, causing him pain and necessitating later surgery. Assuming the facts petitioner has pleaded are true, there is a possibility that he will be able to prove that defendant Luy was deliberately indifferent to his need for medical treatment, either by purposely removing his cast too soon or by failing to provide petitioner with appropriate treatment for the nine months between

the removal of the cast and petitioner's surgery.

Similarly, petitioner has stated a claim against respondents Deppisch and Frank by alleging that he wrote to each of them, requesting treatment for his broken leg for nine months before any response was made. Again, petitioner should be aware that he bears the heavy burden of establishing more than negligent conduct. Vance, 97 F.3d at 992. Eventually, petitioner will have to prove that each respondent knew he was at substantial risk of serious harm and nevertheless ignored his needs. Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005).

C. State Tort Claims

In addition to his claims under § 1983, petitioner contends that respondents Ladwig and Moraine Park Technical College violated state law by their negligent maintenance of the holding cart in the prison's welding room. Federal courts such as this one may have jurisdiction over state law claims only when: (1) the parties are citizens of different states and the amount in controversy is greater than $75,000, 28 U.S.C. § 1332; or (2) a state law claim is part of the same case or controversy as a federal law claim, 28 U.S.C. § 1367. In this case, the parties are all citizens of Wisconsin, so diversity jurisdiction does not exist. Moreover, although plaintiff's state law claim against respondents Ladwig and Moraine Park Technical College arises from the same event that caused the injuries from which his Eighth

Amendment claim arises (namely, his broken leg), the facts and law relevant to plaintiff's Eighth Amendment claim are different from the facts and law relevant to his negligence claim. Consequently, I will decline to exercise supplemental jurisdiction over plaintiff's state law claim against respondents Ladwig and Moraine Park Technical College, and will dismiss the claim without prejudice to petitioner's filing it in state court.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis is GRANTED with respect to his claims that

a. respondents Dr. Luy, Warden Deppisch and Matthew Frank exhibited deliberate indifference to his serious medical needs by failing to provide him with appropriate care for his broken leg for a period of nine months; and

b. respondent Ladwig exhibited deliberate indifference to his serious medical needs by forcing him to walk half a mile on a broken leg in order to obtain medical treatment.

2. Petitioner's claim that respondents Moraine Park Technical College and Joseph Ladwig acted negligently by failing to maintain the holding cart used in the prison welding shop is DISMISSED without prejudice to petitioner's filing his claim in state court.

3. Respondents Moraine Park Technical College, Wisconsin Department of Corrections, Bureau of Prison Health Services and John Doe are DISMISSED from this lawsuit.

4. For the remainder of this lawsuit, petitioner must send respondents Ladwig, Luy, Deppisch and Frank 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.

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 $302.08; 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).

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 respondents.

Entered this 18th day of October, 2006.

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