IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT G. HARKEY,

Petitioner,

OPINION and ORDER

v.

07-C-332-C

MATTHEW FRANK, Sec. Wis. DOC;
PAMELA WALLACE, Warden, Stanley Corr. Inst.;
BECKY DRESSLER, Manager, SCI, HSU;
PATTY SCHERREIKS, Registered Nurse, SCI, HSU;
JERRY SWEENEY, Manager, SCI Unit 2; and
EMILY BOWE, Sgt., SCI Security Staff,

Respondents.

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In this proposed civil action for monetary, declaratory and injunctive relief, petitioner Robert G. Harkey, who is a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin, contends that respondents violated his rights under the First and Eighth Amendments of the United States Constitution and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. Petitioner requests leave to proceed in forma pauperis under 28 U.S.C. § 1915 and has made the initial partial payment required under that statute. In addition, petitioner has requested that the court appoint counsel to help him pursue this lawsuit.

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. 28 U.S.C. § 1915(e)(2).

From petitioner's complaint and the attached materials, I draw the following factual allegations.

ALLEGATIONS OF FACT

A. Parties

Petitioner Robert Harkey is a prisoner housed at the Stanley Correctional Institution in Stanley, Wisconsin.

Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections. At times relevant to this complaint, the remaining respondents were working at the Stanley Correctional Institution in the following positions: respondent Pamela Wallace was the warden, respondent Becky Dressler was the manager of the health services unit, respondent

Patty Schrreiks was a registered nurse, respondent Jerry Sweeney was the manager of unit #2 and respondent Emily Bowe was a member of the security staff.

B. Exposure to Infection

On December 13, 2006, petitioner had "umbilical hernia repair" surgery at the Waupun Memorial Hospital in Waupun, Wisconsin. The resulting incision was covered with a small piece of clear tape. After the surgery, petitioner returned to the Stanley Correctional Institution, where he was examined by Nurse Arnevik, a member of the prison medical staff. Petitioner told Arnevik that he was concerned that his incision was covered only by a piece of clear tape; she told him that "that was all it needed." Arnevik gave petitioner wound care instructions and two copies of his medical restrictions. The medical restrictions form indicated that petitioner was not supposed to work for thirty days, from December 13, 2006 until January 13, 2007.

Before he had his surgery, petitioner worked in the laundry at the Stanley Correctional Institution. When he returned to his housing unit on December 13, 2006, petitioner submitted a copy of his medical restriction form to his supervisor, respondent Bowe. However, on December 14, 2006, respondent Bowe forced petitioner to go to work "handling dirty, germ-filled laundry." Early the following morning, respondent Bowe again forced petitioner to work. At 8:30 a.m. that day, petitioner was called to the Health Services

Unit for a follow-up medical appointment. Respondent Scherreiks examined petitioner. Petitioner told Scherreiks that respondent Bowe misunderstood his medical restriction to prohibit lifting more than twenty pounds only and not to prohibit his work entirely, which is what petitioner believed the restriction to be. Respondent Scherreiks did nothing in response to this information. After petitioner's appointment in the Health Services Unit, respondent Bowe required him to finish his shift at work.

On December 16, 2006, petitioner was in the day room, where he showed Correctional Officer Hand a copy of his medical restriction form and told Hand that he was not supposed to work. Respondent Bowe overheard and began arguing with petitioner about the restriction and accusing him of altering the form to avoid work.

By December 21, 2006, petitioner's incision had become infected. He informed staff in the Health Services Unit of this and was called for an examination at 8:30 a.m. on December 22. Later that day, after consulting with Nurse Practitioner Rock, Nurse Milas gave petitioner two injections of Rocephin and supplies to care for the incision. Petitioner received another three injections of Rocephin over the next three days. On December 26, 2006, Rock took a culture of the infection and gave petitioner a ten-day supply of amoxicillin.

On December 29, 2006, petitioner returned to the hospital in Waupun for a follow-up visit. The doctor told him he would have to return a month later for another examination

because of the infection. The trip to Waupun from the Stanley Correctional Institution takes four hours each way. Prisoners are handcuffed and shackled for the trip, and are sometimes required to wear the hand cuffs and shackles for 12-14 hours at a time, which is very uncomfortable.

On January 5, 2007, Rock told petitioner that his infection was community-associated methicillin resistant staphylococcus aureus, which is a serious, deadly infection. Rock prescribed minocycline for petitioner, because the amoxicillin would not resolve the infection. At that time, Nurse Heyde stated that she thought petitioner contracted the infection when respondent Bowe required him to work in the laundry immediately after his surgery. She gave him instructions for avoiding the spread of the infection and told him it was very contagious.

Petitioner did not receive the minocycline until January 11, 2007. When he picked it up, respondent Scherreiks told him that it had been available for "a while," but that everyone thought that someone else had sent it to petitioner.

On January 29, 2007, petitioner had a final follow-up appointment at the hospital in Waupun. At that appointment, petitioner was cleared to return to work on February 6, 2007.

C. Loss of Employment

On February 1, 2007, respondent Bowe fired petitioner from his job for being absent for more than thirty days. Later that day, petitioner wrote to the program director at the Stanley Correctional Institution to complain about being fired. On February 13, 2007, petitioner filed an inmate complaint regarding his firing. The complaint was returned to him because he did not file it with the proper person, respondent Sweeney. On February 18, 2007, petitioner re-filed his complaint with respondent Sweeney. Respondent Sweeney recommended dismissal of petitioner's complaint, stating that the firing was consistent with the internal management procedure at the Stanley Correctional Institution. On February 27, 2007 petitioner re-filed his complaint, but it was rejected as untimely. On February 28, 2007, petitioner filed a "Request for Review of a Rejected Complaint" with respondent Wallace. In her response, she stated that the rejection of his complaint was justified.

D. Other Medical Care

Petitioner is missing his upper teeth in the rear of his mouth, which makes it difficult for him to chew food. He has been waiting for prison officials to provide him with dentures since September 2005. On February 15, 2007, petitioner wrote to respondent Dressler to ask when he would be called to the dentist's office to have an impression made. She did not respond. On February 28, 2007, petitioner was called to the dentist's office; he believed that

he would have the impression made at that time. Instead, however, the dentist told petitioner that he would have to submit paperwork to Madison before he could make the impression. The dentist had told petitioner this on two prior occasions. Petitioner finally received his dentures on April 17, 2007.

E. Refusal to Deliver Mail

Since petitioner began pursuing this lawsuit, prison officials at the Stanley Correctional Institution have begun to withhold his mail.

OPINION

A. Exposure to Infection

The Eighth Amendment's prohibition on "cruel and unusual punishment" establishes the minimum standard for the treatment of prisoners by prison officials. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). To prevail ultimately on a claim involving conditions of confinement, a prisoner must show both that the conditions to which he was subjected were "sufficiently serious" and that respondents were deliberately indifferent to the inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 835 (1994).

Generally, the inquiry whether the conditions were "sufficiently serious" focuses on the question whether the conditions were contrary to "the evolving standards of decency that

mark the progress of a maturing society." Farmer, 511 U.S. at 833-34 (internal quotations omitted). Knowingly exposing a prisoner to a serious risk of harm may violate the Eighth Amendment. Powers v. Snyder, 484 F.3d 929, 931 (7th Cir. 2007). Petitioner has alleged that respondent Bowe required him to work with "dirty germ-filled laundry" immediately after he had surgery and when the incision from the surgery was covered only by a small piece of tape. Although I have substantial doubts about whether these conditions were sufficiently serious to rise to the level of an Eighth Amendment violation, petitioner *may* be able to adduce additional evidence at a later point in the litigation that supports his allegations. At this early stage, this is minimally sufficient to allow petitioner proceed.

In the context of a conditions of confinement claim, "deliberate indifference" is the equivalent of intentional or reckless conduct. Jackson v. Illinois Medi-Car, Inc., 300 F.3d 760, 765 (7th Cir. 2002). To state a claim, a prisoner must allege, at a minimum, "actual knowledge of impending harm easily preventable." Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)).

Petitioner alleges that respondent Bowe was aware that he had recently had surgery and forced him to work with germ-filled laundry, in spite of a medical restriction prohibiting him from working at all. Petitioner has not alleged that respondent Bowe was aware that doing so would put him at a serious risk of infection, a fact that will be necessary for petitioner to prove if he is to prevail ultimately on his claim. However, petitioner has alleged

enough to put respondent on notice of his claim and has not alleged facts that would plead himself out of court. Edwards v. Snyder, 478 F.3d 827, 830 (7th Cir. 2007) (identifying these two reasons as only grounds under which it is appropriate to dismiss claim at screening). Therefore, petitioner will be granted leave to proceed against respondent Bowe.

Next, petitioner alleges that he told respondent Scherreiks within days of surgery that he was being forced to work with dirty laundry and she did nothing to intervene. Failure to act may result in liability under § 1983. Jackson, 955 F.2d at 22 ("A failure of prison officials to act [in situations of impending harm] suggests that the officials actually want the prisoner to suffer the harm."). Therefore, if respondent Scherreiks knew that working with laundry shortly after surgery placed petitioner at a risk of harm, she may be liable under the Eighth Amendment. Again, because he will need to gather facts about respondent Scherreiks's mental state and the risk posed by working with dirty laundry, this claim will be difficult for petitioner to prove; however, at this early stage, he has done enough to state a claim.

B. Loss of Employment

Petitioner contends that respondents Bowe, Wallace and Sweeney violated his rights under the Americans with Disabilities Act when respondent Bowe fired him from his prison job and respondents Wallace and Sweeney rejected his complaint regarding the firing as

untimely. The Americans with Disabilities Act prohibits certain employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). In enacting the Americans with Disabilities Act, Congress intended to level the playing field for disabled persons. Siefkin v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995).

There are several problems with petitioner's Americans with Disabilities Act claim; however, I need only discuss one. As a threshold matter, any discrimination claim based on petitioner's infection fails because a short term infection cannot qualify as a disability under the Americans with Disabilities Act. An impairment rises to the level of a disability only when its "impact [is] permanent or long term." Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002). "Intermittent, episodic impairments are not disabilities, the standard example being a broken leg." Vande Zande v. State of Wisconsin Dep't of Administration, 44 F.3d 538, 544 (7th Cir. 1995). Because petitioner's infection healed sufficiently for him to return to work within a month and a half, its impact was neither permanent nor long term and therefore, it does not constitute a disability under the Americans with Disabilities Act. Therefore, petitioner will be denied leave to proceed against respondents Bowe, Wallace or Sweeney with respect to his claim that they violated the

Americans with Disabilities Act in their treatment of him.

C. Medical Care at the Stanley Correctional Institution

Petitioner contends that prison officials violated his Eighth Amendment rights by providing him with substandard medical care when they failed to insure that he received the antibiotic treatment for his infection in a timely manner and when they delayed giving him dentures for his upper back teeth for a year and a half. The only respondents he identifies as having any role in either event are respondent Schrerreiks and respondent Dressler.

Under the Eighth Amendment, a prison official may violate a prisoner's right to medical care, (including dental care, Board v. Farnham, 394 F.3d 469, 479 (7th Cir. 2005)) if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the detainee to a substantial risk of serious harm, Farmer, 511 U.S. 825.

The first step is to determine whether petitioner suffered from a serious medical need. At this early stage, the bar is low. Petitioner alleges that his bacterial infection was life-threatening; this is sufficient to allege that the infection constituted a serious medical need. More difficult to assess is whether a need for partial dentures could be a serious medical need. Petitioner alleges that he had difficultly chewing because he was missing all of his upper back teeth. In extreme form, such a medical need might rise to the level of a serious medical need; for example, if the missing teeth significantly limited petitioner's ability to eat food. At this early point in the lawsuit, I will not speculate about the severity of petitioner's condition and will assume that missing teeth constituted a serious medical need.

However, it is not enough that petitioner suffered from serious medical needs. To be liable, respondents must also have been deliberately indifferent to these needs. Petitioner alleges that respondent Scherreiks was aware that he had a serious infection, knew he needed medication and did not check to insure that he had received the medication. These allegations suggest negligence, at worst. However, it is theoretically possible that petitioner will be able to adduce evidence that respondent Scherreiks knew that plaintiff needed medication and withheld it. If he adduces such evidence, her actions could constitute deliberate indifference; therefore, petitioner will be granted leave to proceed against respondent Scherreiks.

Next, petitioner alleges that he alerted respondent Dressler to his need for dentures

and that she ignored his request for dental care. Petitioner will be granted leave to proceed against respondent Dressler as well. However, he should be aware that, to prevail on his claims against respondents Dressler and Scherreiks, he will need do more than show that they were simply negligent in their treatment of him. To prevail on his Eighth Amendment claim, petitioner will have to show that respondents were aware that their failure to treat him posed a substantial risk to his health and that they disregarded this risk.

D. Denial of Mail

Petitioner alleges that prison officials began denying his mail in retaliation for him "starting this suit." Prisoners have a First Amendment right to send and receive mail. Thornburgh v. Abbott, 490 U.S. 401, 413 (1989); Procunier v. Martinez, 416 U.S. 396, 413-14 (1974). However, this right is not unfettered. Prison officials may deny delivery of incoming mail to prisoners if they have a legitimate penological reason for doing so. Turner v. Safley, 482 U.S. 78, 89 (1987). However, a prison officials who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Individuals have a constitutionally protected right to access the courts. Therefore, a prison official who takes adverse action against a prisoner for filing a lawsuit may be liable for such retaliation.

Although either one of the legal theories described above might apply, petitioner has

not identified *who* has violated his rights by withholding his mail in retaliation for his pursuing this lawsuit. Neither his statement that "Since starting this suit, SCI Officials have started withholding my mail" or materials attached to the complaint offer any hint that any of the named respondents were involved in withholding his mail. Therefore, petitioner will denied leave to proceed on this claim.

E. Respondent Frank

For a respondent to be liable under § 1983, he or she must have participated directly in a violation of the petitioner's constitutional rights. Hildebrandt v. Illinois Dept. of Natural Resources, 347 F.3d 1014, 1036 (7th Cir. 2003). "Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation." Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996). With respect to supervisors,

> an official satisfies the personal responsibility requirement of section 1983 if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent. That is, he must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye. In short, some causal connection or affirmative link between the action complained about and the official sued is necessary for § 1983 recovery.

Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Petitioner has not alleged any facts suggesting that respondent Frank was personally involved in the incidents underlying

plaintiff's claims. Although respondent Frank is Secretary of the Wisconsin Department of Corrections, the doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981).

F. Motion for Appointment of Counsel

Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)(quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). The Seventh Circuit will find such an appointment reasonable where petitioner's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not, however, whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

In Hudson v. McHugh, 148 F.3d 859, 862 (7th Cir. 1998), the court of appeals declined to find that it was an abuse of the court's discretion to deny the prisoner plaintiff's

request for a lawyer to represent him on his claim that he had been denied epilepsy mediation for 11 days, precipitating a seizure. The court of appeals acknowledged that although prisoner cases raising Eighth Amendment claims of denial of medical care almost always present "tricky issues of state of mind and medical causation," it was reasonable for the court to evaluate the plaintiff to be as competent as any other average pro se litigant to present his case. Id. at n.1.

The challenges that petitioner faces in proving the facts of his case are the same challenges faced by every other pro se litigant claiming deliberate indifference to conditions of confinement and a serious medical need. Like the plaintiff in Hudson, petitioner will have to prove respondents' state of mind and the medical causation for his injuries. To prevail on his claim regarding his forced work with dirty laundry, he will also need to show that his exposure to the laundry environment at a time when he had a tape-covered surgical incision placed him at a serious risk of harm. Such proof may well be difficult to come by. But the fact that matters of state of mind and causation are tricky to prove is not sufficient reason by itself to find that petitioner's case presents exceptional circumstances warranting appointment of counsel. If it were, it would be established law that district courts are not free to decline to appoint counsel for pro se litigants raising claims of denial of medical care.

Petitioner argues that he needs a lawyer to help him with his case because "the issues . . . are complex" and he has limited knowledge of the law. In addition, petitioner states that

he has a "mental defect" of an unidentified nature and has received help from other prisoners in preparing his complaint.

Petitioner's claims are not unusually complex. Instead, they are straightforward Eighth Amendment claims. The law governing this type of claim is settled and is explained to petitioner in this order. The difficulty associated with petitioner's case lies not in the law, but in the need for evidence to support his claims. However, at this point, there is no reason to believe that petitioner cannot gather such evidence while incarcerated. The materials that petitioner has submitted to the court thus far are clear, well-organized and reflect his ability to understand both his claims and the information necessary to support them. Without more information about his "mental defect" or its effect on his ability to continue to litigate this lawsuit, I cannot conclude that this broad allegation is sufficient to entitle him to a lawyer, particularly when the materials he has submitted up to this point do not reflect such a need.

Petitioner has available to him all of the discovery tools described in the Federal Rules of Civil Procedure. If he has questions about how to use those tools, he is free to ask the magistrate judge for guidance at the preliminary pretrial conference. In addition, petitioner has personal knowledge of the events at the heart of his complaint and of the treatment he received (or didn't receive, as the case may be). In addition, he should be able to obtain access to his own medical records to corroborate information regarding his medical

conditions and any treatment he received. Even if petitioner were to require a medical expert, he suggests no reason why he could not seek out such a professional witness on his own. If petitioner is requesting counsel with the idea that he will be able to shift to the lawyer the cost of hiring an expert, he should understand that regardless whether he is represented by counsel, his indigent status does not excuse him from his obligation to pay the costs of deposing witnesses or hiring experts to testify on his behalf.

In summary, I believe that petitioner is capable of prosecuting this lawsuit and that having appointed counsel will not make a difference in the case's outcome.

ORDER

IT IS ORDERED that:

1. Petitioner is GRANTED leave to proceed on his claims that respondents Emily Bowe and Patty Scherreiks violated his constitutional rights by exposing him to conditions of confinement that violate the Eighth Amendment.

2. Petitioner is GRANTED leave to proceed on his claims that respondents Scherreiks and Becky Dressler violated his Eighth Amendment rights by denying him medical and dental care.

3. Petitioner is DENIED leave to proceed on his claims against respondents Matthew Frank, Pamela Wallace and Jerry Sweeney. Respondents Frank, Wallace and Sweeney are

DISMISSED from this lawsuit.

4. For the remainder of this lawsuit, petitioner must send respondents 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 $342.91; 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, materials attached to it and this order are being sent today to the Attorney General for service on the state respondents.

Entered this 9th day of July, 2007.

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