IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

NORMAN MALONE,

OPINION AND ORDER

Petitioner,

07-C-377-C

v.

MATTHEW FRANK and
CORRECTIONS CORPORATION OF AMERICA,

Respondents.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983 and state law. Petitioner Norman Malone was previously confined at the North Fork Correctional Facility, a private prison in Oklahoma that respondent Corrections Corporation of America ran under a contract with the Wisconsin Department of Corrections. He contends that his rights under the Eighth Amendment and Wis. Stat. § 301.21(1m)(a)9 were violated by the way Corrections Corporation's employees responded to a prison "disturbance." Petitioner has made his initial partial payment in accordance with 28 U.S.C. § 1915.

Because petitioner is a prisoner, I am required under the 1996 Prison Litigation

Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail 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 and 1915A. A review of petitioner's complaint requires me to conclude that his complaint must be dismissed with respect to respondent Matthew Frank because petitioner has not included any allegations in his complaint about Frank. Petitioner's state law claim must be dismissed as well. Petitioner is correct to cite Wis. Stat. § 301.21(1m)(a) as a statute relating to the care of Wisconsin prisoners who are housed out-of-state. But the statute simply lists various provisions that must be included in the contract that the Department of Corrections has with the host state; the statute does not create a private right of action under which prisoners may sue if they believe that a contract provision has been breached.

I will stay a decision with respect to petitioner's federal claims because it is not clear whether petitioner intends to sue parties who are not named in the caption of the complaint. Petitioner may have until August 31, 2007 in which to amend his complaint or inform the court that he wishes to proceed against respondent Corrections Corporation only.

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). In his complaint, petitioner alleges the following facts.

## ALLEGATIONS OF FACT

Petitioner Norman Malone is a prisoner at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. In 2003, petitioner was confined at the North Fork Correctional Facility in Sayre, Oklahoma. Although the North Fork Correctional Facility was a private prison owned by respondent Corrections Corporation of America, the state of Wisconsin had legal custody of petitioner. (For several years, the state of Wisconsin held some of its prisoners in privately run out-of-state facilities such as the North Fork facility, but the state has since abandoned that practice. The North Fork facility closed soon after the events giving rise to this suit, after only five years of operation. Ron Jackson, Decision to Close Prison Leaves Sayre Officials Seeking Answers, The Oklahoman, (June 17, 2003), available at 2003 WLNR 16536807).

On April 28, 2003, a number of prisoners began a "disturbance" in the North Fork dining facility. At the time of the incident, petitioner was working in the food service line in the kitchen, which is separated from the dining area by "an enclosed wall." Neither he nor any other kitchen workers were involved in the disturbance. (Petitioner includes no allegations in his complaint regarding the nature or extent of the "disturbance." A newspaper article attached to petitioner's complaint says that the disturbance lasted three hours and "resulted in minor injuries to a guard and about $12,000 damage.")

After the disturbance began, the two security officers assigned to the kitchen, Chad

Gamble and Jesse Vidaurri, ran out of the room and locked the door behind them, leaving petitioner, the other inmate food service workers and two non-prisoner staff members trapped. The kitchen workers began yelling for Gamble to open the door, but he "appeared to be frozen with fear." He gave the kitchen workers "a stare of indecision" before running off. (Presumably, there was a window in the door that allowed the kitchen workers to make visual contact with Gamble.)

Suddenly, the lights were turned off in the kitchen and gas canisters containing chemical agents were thrown on the floor. As the gas spread throughout the small room, petitioner was blinded and began experiencing a grand mal seizure. The amount of chemical agents used was "far greater than that recommended by the Chemical Agent(s) manufacture[r]."

Two members of the "S.O.R.T. Team" entered the kitchen and retrieved the two non-prisoner staff members. Once the non-prisoner staff members were removed, security staff ordered petitioner and the other food workers to remove their clothes and lie down on the floor. Because petitioner was experiencing a seizure, he did not hear the order. As a result, several officers ripped off petitioner's clothes, handcuffed his arms behind his back and "slamm[ed]" his body down on the floor, which was now covered with blood, urine, vomit "and other unknown filth."

Petitioner and the food workers were wearing yellow uniforms designating them as

kitchen staff. Security staff knew by watching the cameras monitoring the dining area that kitchen staff were not involved in the disturbance.

When several other inmates "attempted to sit up," officers released three more canisters of chemical agents, exacerbating petitioner's seizure. As a result of the seizure, petitioner was "thrashing violently," so much so that one officer commented, "This one is acting like a fish out of water." Eventually, petitioner fell unconscious.

Petitioner was left in this state from approximately 6:15 p.m. until 7:57 p.m., when he was finally taken to the medical services unit, still unconscious. He was held in that unit from April 28 until May 1, but because of an order by the warden (Jody Bradley), petitioner was not allowed to take a decontamination shower until a few hours before his release from the medical unit. As a result, chemical agents "cling[ed]" to petitioner's hair and skin, inducing "mild seizure episode(s)."

Petitioner returned to the medical services unit on May 6 as a result of "burning and itching skin problems" caused by his exposure to the chemical agents. He was referred to a doctor for further assessment. Throughout May and June, petitioner continued to require treatment for "pains in [his] back and leg."

On May 14, the warden acknowledged in a letter to petitioner that he was not involved in the April 28 disturbance.

Petitioner filed a prison grievance with Corrections Corporation in which he

complained about the incidents described above. The grievance was denied on the ground that "emergency procedures were followed by staff."

## DISCUSSION

From my reading of the allegations in petitioner's complaint, I understand him to be complaining of six different incidents related to the April 2003 disturbance:

- locking him in the kitchen at the beginning of the disturbance;
- dispensing chemical agents in the kitchen, even though the disturbance was not located there and staff knew that the kitchen workers were not involved in the disturbance;
- stripping, handcuffing and "slamming" him on the ground, which was covered in blood, vomit and "other filth";
- a second use of chemical agents after he began having a seizure;
- a delay in providing him with medical care after his seizure;
- refusing to allow him to take a decontamination shower for several days, inducing additional "mild" seizures.

Although it is relatively clear which claims petitioner means to assert, the more puzzling question is who he believes should be held liable for these actions. Petitioner names only two respondents: Matthew Frank (the former Secretary of the Wisconsin Department of Corrections) and the Corrections Corporation of America (the company that owns the

private prison in which petitioner was housed at the time of the disturbance). However, as will be discussed below, it is not clear whether these are petitioner's intended respondents or at least the only ones he means to sue.

Ordinarily, only government entities and employees may be sued for constitutional violations under 42 U.S.C. § 1983. Johnson v. LaRabida Children's Hospital, 372 F.3d 894, 896 (7th Cir. 2004). However, I have consistently held that employees of Corrections Corporation may be treated as government employees for the purpose § 1983 liability because Corrections Corporation is performing a function and exercising authority that is generally reserved for the state. E.g., Henderson v. Brush, No. 06-C-12-C, 2006 WL 561236, *8 (W.D. Wis. March 6, 2006). See also Wilson v. McRae's, Inc., 413 F.3d 692, 693 (7th Cir. 2005) ("Private entities may be treated as state actors when the state effectively transfers authority to them."). It follows necessarily that Corrections Corporation itself may be sued under § 1983. Rosborough v. Management & Training Corp., 350 F.3d 459 (5th Cir. 2003). Private entities may not assume the power of the government without also assuming the corresponding responsibilities. To conclude otherwise would create a disturbing gap in accountability in an area of the law it is greatly needed.

This does not mean that Corrections Corporation is automatically liable for the actions of its employees. Rather, it is treated like any other government entity under § 1983 (except for states and state agencies, which may not be sued at all, Will v. Michigan Dept.

of State Police, 491 U.S. 58, 64 (1989)). Woodward v. Correctional Medical Services of Illinois, Inc., 368 F.3d 917, 927 (7th Cir. 2004) (applying municipal liability standard to private provider of medical services to prisoners). Under that standard, Corrections Corporation may be liable if it had a policy, custom or widespread practice that caused the unconstitutional conduct. Davis v. Carter, 452 F.3d 686, 691 (7th Cir. 2006).

A similar standard applies to respondent Frank. A high ranking official like Frank may not be held responsible under 42 U.S.C. § 1983 for the actions of correctional officers unless he too was "personally involved" in the alleged constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir.1995). As a general matter, this means that he must have directly participated in the unconstitutional conduct or somehow directed it. Obviously, respondent Frank was not present at the North Fork Correctional Facility when the disturbance occurred and he did not give the orders for any of the conduct about which petitioner complains. Thus, petitioner could satisfy the personal involvement requirement with respect to respondent Frank only if Frank was responsible for a policy that caused the particular violation. Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986).

Petitioner gives mixed messages in his complaint regarding whether he believes the officers were acting in accordance with policy or contrary to it. In one instance, he says that the officers were *violating* a "CCA/NFCF-WDOC Contract requirement" on uses of force when they failed to allow petitioner and the other kitchen workers to "remove [them]selves

from this situation" before using chemical agents. Cpt., dkt. #2, at ¶11. However, later in his complaint, he alleges that the response to the disturbance was conducted in accordance with "emergency procedures."

Construing petitioner's complaint liberally, I understand him to allege that although some of the officers' actions may have violated the official policy of respondent Corrections Corporation, it was nevertheless the unofficial policy or practice to respond the way they did. Although this is likely to be extremely difficult for petitioner to prove, that is not the standard for determining whether a party has stated a claim upon which relief may be granted. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965-66 (2007) ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely"). Accordingly, to the extent that petitioner has alleged constitutional violations, I will allow him to proceed against respondent Corrections Corporation of America.

I cannot come to the same conclusion with respect to respondent Frank for the simple reason that petitioner includes no allegations in his complaint regarding Frank. Petitioner *does* allege that Jon Litscher, Frank's predecessor as Secretary of the Wisconsin Department of Corrections, approved respondent Corrections Corporations's procedures related to this case. The reason petitioner named Frank instead of Litscher is revealed elsewhere in the complaint, where petitioner says that he substituted Frank for Litscher in accordance with

Fed. R. Civ. P. 25(d). Under that rule, a newly appointed public officer is automatically substituted in cases in which the plaintiff had been suing the predecessor in his official capacity. (Frank replaced Litscher in early 2003. Presumably, petitioner believes that any policies in force at the time of the disturbance had been approved before respondent Frank took office.)

Although petitioner's attempt to comply with the Federal Rules is laudable, unfortunately, it is misguided because the secretary of the department cannot be sued in his official capacity in this case. Under Will, official capacity suits for money damages are barred. Although injunctive relief is permitted under Will, in this case there is no injunctive relief to be had. Petitioner is no longer housed at a Corrections Corporation facility and there is little chance that he will be in the future because Wisconsin no longer sends its prisoners to private facilities. In any event, petitioner is not seeking an injunction.

Because petitioner is seeking money damages only, he may sue only the individual who was personally involved in the alleged constitutional violation. In other words, petitioner may not recover money damages from respondent Frank for Litscher's conduct. The complaint must be dismissed as to respondent Frank.

The body of petitioner's complaint suggests that he mistakenly omitted not only Litscher from the caption, but perhaps other individuals as well. First, on at least one occasion, petitioner refers to Chad Gamble as a "named defendant" even though Gamble is

not listed in the caption of petitioner's complaint. Also, he discusses several other Corrections Corporation employees, including Jesse Vidaurri and Jody Bradley, who he appears to believe violated his constitutional rights, but he does not identify them as respondents. Finally, at the beginning of his complaint, petitioner says that he does not know the names of "several relevant staff members [whose] actions give rise to the claim of violation(s) of Plaintiffs' Civil Rights." However, petitioner does not list John or Jane Does in the caption or identify in the body of the complaint which claims include unnamed respondents and how many unnamed respondents there are.

Accordingly, I will stay a decision whether to allow petitioner to proceed on his federal claims to give him an opportunity to decide which parties he intends to sue. Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir. 1996) (district court should allow pro se party opportunity to amend his complaint to identify unnamed respondents) . If petitioner wishes to proceed against Corrections Corporation only, he may submit a written statement to the court that he does not wish to amend his complaint.

However, if petitioner intends to sue other parties, he must file an amended complaint that identifies all those parties in the caption. If petitioner wishes to sue parties whose names are unknown to him, he should identify which claims include unnamed respondents, what their involvement in the alleged violation was and how many unnamed respondents there are. Petitioner should include a reference to the unnamed respondents

in every instance in which they play a relevant part to the story. In other words, petitioner should treat the unnamed respondents the same as the named ones, with the exception that he should refer to the unnamed respondents as "John Doe" or "Jane Doe." (If petitioner does wish to proceed against unknown officers and I conclude after screening petitioner's amended complaint that he has alleged sufficient facts to suggest that such officers violated his constitutional rights, I will allow petitioner to proceed against respondent Corrections Corporation for the purpose of discovering the identities of the unknown officers.)

A few words of caution for petitioner: respondent Corrections Corporation's employees in Oklahoma may not have sufficient contacts with Wisconsin to provide a basis for a court in this state to exercise personal jurisdiction over them. Lodholz v. Puckett, No. 03-C-350-C, 2003 WL 23220723, *5 (W.D. Wis. Nov. 24, 2003). Further, because most of the events giving rising to this lawsuit occurred in Oklahoma, the entire case may be subject to a motion to transfer for improper venue. Thomas v. Corrections Corp. of America, 2003 WL 23274508, *2 (W.D. Wis. June 24, 2003). However, because I do not know with certainty what Wisconsin contacts any potential respondents might have and because both lack of personal jurisdiction and improper venue can be waived, Moore v. Olsen, 368 F.3d 757, 759 (7th Cir.2004), I leave it up to petitioner to decide whether he wants to take his chances in this court.

One final note. Petitioner included a significant amount of legal argument in his

complaint. That was unnecessary. Petitioner is not required to cite legal authority in his complaint or even identify his legal theory. If petitioner files an amended complaint, he may omit his legal arguments if he wishes.

## ORDER

IT IS ORDERED that

1. Petitioner Norman Malone's complaint is DISMISSED as to respondent Matthew Frank and as to petitioner's claim under Wis. Stat. § 301.21.

2. A decision whether to grant petitioner Norman Malone leave to proceed against any other respondent is STAYED. Petitioner may have until August 31, 2007, in which to inform the court in writing whether he wishes to proceed against respondent Corrections Corporation only. If petitioner wishes to proceed against other parties, he must file an amended complaint in which he names in the caption all parties he wishes to sue. If he wishes to proceed against any unnamed respondents, he should identify these respondents as "John Doe" or "Jane Doe" in the body of the complaint and in the caption. Once

petitioner files his response, I will screen his complaint with respect to his federal claims.

Entered this 14th day of August, 2007.

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