

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JEREMY MICHAEL WINE, ROBERT SUTTON,
JAMES TERRY, MATTHEW WILCOX, ROMELL
LAMPLEY, JOHNNY HYLER, JAIME ESQUIVEL,
PAUL JOHNSON, LARRY ASHLEY, GEORGE MARQUETTE,
DAMIAN REYES, MATTHEW KAUFFMAN,
MICHAEL THORN, OSMAIDE PALACIO,
GEORGE PETERS, BARTON KODRICH,
JOHN SCHWIESOW, JARAL MACCOLLUM,
FERNANDO GUARNERO, DANIEL AGUILAR,
HOUA YANG, MICHAEL EGERTON, TYRE KARLS,
PHILLIP GREEN, ORLANDUS POWELL,
MARTIN ELLIOT, DAVID L. PARKER,
CRAIG WILLIAMS, WILLY LOVE,
RAIMUNDO JONES, NORMAN RHODES,
DARVIN HARRIS, JAMES PRUITT,
TYRONE WILLIAMS, WILLIAM CHAPMAN,
JOSE MONTANEZ, RAMONDO SEYMOUR,
MAGNUS WILSON and SHEDWICK SPENCER,

Plaintiffs,

v.

DEPARTMENT OF CORRECTIONS,
JOHN E. LITSCHER, Secretary of Department of
Corrections, STATE OF WISCONSIN,
PRISON REALTY TRUST, INC., f/k/a TRANSCOR,
UNKNOWN EMPLOYEES OF PRISON
REALTY TRUST, INC., CORRECTIONS
CORPORATION OF AMERICA and
NORTH FORK CORRECTIONAL FACILITY,

Defendants.

OPINION AND ORDER
00-C-704-C

In this proposed civil action for monetary relief, plaintiffs contend that defendants violated their rights under the Eighth Amendment and various state laws during their transfer from various facilities in the state of Wisconsin to a privately run prison in Oklahoma. In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972).

Plaintiffs have paid the full fee for filing their complaint. However, because they are prisoners and at least one of the defendants is a “governmental entity or officer or employee of a governmental entity,” this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A(a), (b). Although this court will not dismiss plaintiffs’ case sua sponte for lack of administrative exhaustion, if defendants can prove that plaintiffs have not exhausted the remedies available to them as required by § 1997e(a), they may allege plaintiffs’ lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See 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). Jurisdiction is present. See 28 U.S.C. §§ 1331, 1367.

Because I find that plaintiffs have alleged facts sufficient to support an Eighth

Amendment claim as well as state law claims of assault and battery, intentional infliction of emotional distress and negligence, they may proceed against defendants Prison Realty Trust, Inc. and Corrections Corporation of America on these claims. All other defendants will be dismissed.

On December 20, 2000, defendants State of Wisconsin, Department of Corrections and Secretary John Litscher filed a motion to dismiss plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6). Although this motion has not been fully briefed by the parties, this motion will be denied as moot because defendants State of Wisconsin, Department of Corrections and Secretary John Litscher will be dismissed pursuant to this order.

In their complaint, plaintiffs make the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Defendant Corrections Corporation of America is a corporation organized under the laws of the state of Tennessee; it owns and operates defendant North Fork Correctional Facility in Sayre, Oklahoma. Defendant Prison Realty Trust, Inc., f/k/a Transcor, acted pursuant to a contract between defendant Corrections Corporation of America and defendant State of Wisconsin. Defendant Department of Corrections is a department of defendant State of

Wisconsin. Defendant John Litscher is Secretary of the department. Plaintiffs are Wisconsin residents who have been imprisoned at various facilities.

B. Bus Ride

On January 25, 2000, plaintiffs were imprisoned at various correctional facilities in Wisconsin. Defendant State of Wisconsin contracted with defendant CCA for the imprisonment of each plaintiff at North Fork Correctional Facility. Either defendant state or defendant CCA contracted with defendant Prison Realty Trust, Inc. to transport plaintiffs from prison facilities in the state of Wisconsin to North Fork.

On or about January 25, 2000, defendant Prison Realty Trust picked up plaintiffs to transport them by bus to North Fork. The temperature in the bus was below freezing and there was no heat on the bus in the area where the prisoners sat. The bus had frost on the inside of the windows because of the lack of heat. The bus had an inoperative muffler system that allowed exhaust and carbon monoxide to filter into the bus. During the trip, each plaintiff wore a prison jumpsuit and did not have any other clothing. Because of the cold temperatures, several of the plaintiffs suffered frostbite and hypothermia.

The toilet on the bus was inoperative. Plaintiffs were allowed to go to the bathroom twice during the 30 to 32-hour trip. The toilet overflowed with urine and feces onto the floor

in the area of the bus where plaintiffs sat, forcing plaintiffs to endure the smell from the toilet and the splash of urine and feces on their feet, shoes and pants. Because of the smell from the overflowing toilet, exhaust of the bus and carbon monoxide, several plaintiffs vomited on themselves and others.

When allowed to go to the bathroom, plaintiffs had to use a funnel that was connected to a gas can while shackled to another prisoner and on a moving bus, causing some of the plaintiffs to urinate on themselves and others. Many of the plaintiffs urinated and defecated on themselves because the guards did not allow plaintiffs to go to the bathroom and the toilet was not working. Plaintiffs were forced to hold their urine and feces for long periods of time, causing plaintiffs pain and suffering.

Several of plaintiffs were deprived of their medications. After plaintiffs requested their medication several times, the guards threw the medication on the floor in the urine and excrement, out of plaintiffs' reach.

During the trip, plaintiffs were deprived of meals. Several of the plaintiffs were dehydrated and starved upon their arrival at North Fork.

C. Medical Care

Upon arrival at North Fork, several of the plaintiffs were denied immediate medical care

for their physical injuries from the bus.

D. Visitation and Legal Materials

While imprisoned at North Fork, plaintiffs were not given proper visitation rights or access to an adequate law library.

OPINION

A. Defendants

1. Defendants State of Wisconsin and Department of Corrections

Plaintiffs named the state of Wisconsin and the Wisconsin Department of Corrections as a defendant in this case. The Supreme Court has held that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989). Plaintiffs may not proceed against defendants State of Wisconsin or Wisconsin Department of Corrections or defendant Litscher in his official capacity.

2. Personal involvement: individual capacity claims

It is well established that liability under § 1983 must be based on the defendant’s

personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). It is not necessary that a defendant participate directly in the deprivation; the official is sufficiently involved “if she acts or fails to act with a deliberate or reckless disregard of plaintiffs constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent.” Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). Under this authority, it is clear that defendant Litscher is not liable for the deprivation of any of plaintiffs' constitutional rights because plaintiffs have not alleged that defendant Litscher participated personally in any deprivation of their constitutional rights.

3. State actor requirement

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that he was deprived of a constitutional right and that a person acting under color of state law deprived him of such right. See Gomez v. Toledo, 446 U.S. 635, 640 (1980). One of the defendants in this case is Corrections Corporation of America, which is a private enterprise. This fact might suggest that all of plaintiffs' claims against this defendant could be dismissed summarily for failure to meet the state actor requirement. However, courts have determined that defendant

Corrections Corporation of America and its employees are “state actors” under § 1983. See Street v. Corrections Corp. of America, 102 F.3d 810, 814 (6th Cir. 1996) (firm operating prison is state actor because firm performed "traditional state function" of operating a prison); Giron v. Corrections Corp. of America, 14 F. Supp.2d 1245, 1249 (D.N.M. 1998) (privately employed correction officer is state actor because he performed state function of incarcerating citizen). In light of these rulings, it would be inappropriate to dismiss plaintiffs' claims on this ground. For purposes of § 1983 liability, a private entity is deemed to be acting under color of law only when it "is a willful participant in joint action with the State or its agents." See Dennis v. Sparks, 449 U.S. 24, 27-28 (1980). I will allow plaintiffs to proceed against defendants Prison Realty Trust, Inc., and Corrections Corporation of America but they will be dismissed if it becomes clear that they do not qualify as state actors for purposes of § 1983 liability.

4. Service of John Does

Because plaintiffs do not know the names of all the individual defendants, plaintiffs will have to conduct formal discovery promptly to uncover the names of the persons they allege are directly responsible for violating their constitutional rights, see Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981), and amend their complaint to include these individuals as defendants. If plaintiffs fail to discover the names of defendant Prison Realty Trust's employees

who are allegedly responsible for violating plaintiffs' rights, they will be unable to serve these individuals with their complaint and thus will be unable to recover against them, if recovery is warranted. If defendant Prison Realty Trust, Inc. is dismissed because it is determined that it does not qualify as a state actor for purposes of § 1983 liability, its employees will be dismissed as well.

B. Eighth Amendment

In order to state a claim under the Eighth Amendment, plaintiffs' allegations about conditions during their transfer between prisons must satisfy a test that involves both a subjective and objective component. See 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. In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference "implies at a minimum actual knowledge of

impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.” Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)). 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). Reading plaintiffs' complaint liberally, I conclude that plaintiffs have alleged facts sufficient to proceed on an Eighth Amendment claim against defendants CCA, Prison Realty Trust, Inc. and unknown employees of Prison Realty Trust, Inc.

C. Other Federal Claims

Plaintiffs also allege that they were “not given proper visitation rights and not given access to an adequate law library in violation of the state’s own policies and the constitutional amendments of the United States while imprisoned at [North Fork]. In addition, upon arrival at [North Fork], several of the Plaintiffs were denied or refused immediate medical care for the physical injuries sustained due to the inhumane conditions on the bus trip.” Cpt., dkt. #2, at ¶ 11. In their complaint, plaintiffs have not pleaded causes of action for inadequate medical care, visitation or access to legal materials. Even if they had, their vague factual allegations are insufficient to support such claims. Because these were the only potential claims against

defendant North Fork, this defendant will be dismissed.

D. State Law Claims

“[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.” 28 U.S.C. § 1367(a). Pursuant to § 1367(a), I will exercise supplemental jurisdiction over plaintiffs' state law claims.

1. Assault and battery

“An assault is an unlawful attempt, coupled with apparent present ability, either to do physical harm to another or to put another in fear that physical harm will be done to that person.” Wis. JI-Civil 2004. The elements of a civil battery are intentional bodily harm to the plaintiff without the plaintiff's consent. See Wis. JI-Civil 2005. Plaintiffs may proceed on their claims of assault and battery against defendant Prison Realty Trust, Inc. for the sole purpose of discovering the names of the individual employees of Prison Realty Trust who are allegedly responsible.

2. Intentional infliction of emotional distress

In order to sustain a claim of intentional infliction of emotional distress, plaintiffs must prove that: (1) the purpose of defendants' conduct was to cause emotional distress; (2) their conduct was extreme and outrageous; (3) their conduct was the cause in fact of the injuries; (4) plaintiffs suffered an extreme disabling emotional response. See Musa v. Jefferson County Bank, 233 Wis. 2d 241, 249 n.9, 607 N.W.2d 349, 353 (Ct. App. 2000) (citing Anderson v. Continental Insurance Company, 85 Wis. 2d 675, 694-95, 271 N.W.2d 368 (1978)); see also Alsteen v. Gehl, 21 Wis. 2d 349, 356, 124 N.W. 2d 312, 316 (1963) (concluding that claim for intentional infliction of emotional distress requires showing of extreme and outrageous conduct undertaken for purpose of inflicting psychological harm). At this point in the litigation, plaintiffs may proceed on their claim of intentional infliction of emotional distress against defendant Prison Realty Trust, Inc. for the sole purpose of discovering the names of the individual employees of Prison Realty Trust who are allegedly responsible.

3. Negligent retention, training and supervision

In Wisconsin, the elements of a negligence claim are: "(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." Antwaun A. v. Heritage

Mutual Insurance Co., 228 Wis. 2d 44, 55, 596 N.W.2d 456, 461 (1999). Plaintiffs may proceed on their negligence claim against defendants Prison Realty Trust, Inc. and Corrections Corporation of America.

ORDER

IT IS ORDERED that

1. Plaintiffs Jeremy Michael Wine, Robert Sutton, James, Terry, Matthew Wilcox, Romell Lampley, Johnny Hyler, Jaime Esquivel, Paul Johnson, Larry Ashley, George Marquette, Damian Reyes, Matthew Kauffman, Michael Thorn, Osmaide Palacio, George Peters, Barton Kodrich, John Schwiesow, Jaral Maccollum, Fernando Guarnero, Daniel Aquilar, Houa Yang, Michael Egerton, Tyre Karls, Phillip Green, Orlandus Powell, Martin Elliot, David Parker, Craig Williams, Willy Love, Raimundo Jones, Norman Rhodes, Darvin Harris, James Pruitt, Tyrone Williams, William Chapman, Jose Montanez, Ramondo Seymour, Magnus Wilson and Shedwick Spencer may proceed on their Eighth Amendment claim against defendants Corrections Corporation of America, Prison Realty Trust, Inc. and unknown employees of Prison Realty Trust, Inc., on their state law claims of assault and battery and intentional infliction of emotional distress against defendant Prison Realty Trust and on their negligence claim against defendants Corrections Corporation of America and Prison Realty Trust;

2. All other claims are DISMISSED and defendants Department of Corrections, John Litscher, State of Wisconsin and North Fork Correctional Institution are DISMISSED; and
3. The motion of defendants State of Wisconsin, Department of Corrections and

Secretary John Litscher to dismiss is DENIED as moot.

Entered this 27th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge