IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CONNOR Q. SAVADA,

ORDER

Petitioner,

02-C-0101-C

v.

BILL McREEDY, SHARON ZUNKER,
HAYLEY HERMANN and JANE GAMBLE,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

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). 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 on three or more previous occasions had a suit 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 seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove 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). 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).

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Connor Q. Savada is an inmate confined at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Respondent Bill McReedy is the medical director at the Kettle Moraine Correctional Institution, where respondent Jane Gamble is the warden and respondent Hayley Hermann is an inmate complaint examiner. Respondent Sharon Zunker is the director of the Bureau of Health Services for the Wisconsin

Department of Corrections.

On December 30, 2001, plaintiff wrote the health care services unit at Kettle Moraine Correctional Institution requesting treatment for a badly infected ingrown toe nail on the big toe of his right foot. Petitioner indicated that the toe was causing him a lot of pain. On December 31, 2001, petitioner received a response from the health care unit directing him to soak his toe, cover it with bandages and otherwise leave it alone. Because it was a holiday and there was only one person in the medical unit (and none after 2:00 pm), petitioner was told to sign up for sick call again after Tuesday if necessary. As directed, petitioner submitted another request for medical assistance regarding his toe, which at this point was bleeding, discharging puss and causing him great pain. Petitioner was seen by a nurse on January 5, 2002 and was given "Beta-sep" and bandages to clean his infected toe. Because petitioner's toe was not getting better, he submitted another request for medical assistance on or about January 7, 2002. Petitioner was summoned to the health services unit on January 9, 2002 in response to his request. Petitioner, who wanted to see a medical doctor, was informed by a nurse that the prison only had a part-time doctor and it would be a long time before he could see a doctor. In fact, petitioner was told he was number 200 on the list of prisoners waiting to see the doctor. Petitioner asked if he could see a doctor sooner, but was told that even nurses who need to see a doctor have to wait. Petitioner offered to pay to see a private doctor because of the pain he was in, but his offer was rebuffed.

On January 10, 2002, petitioner again submitted a request for medical assistance. Petitioner's request noted that his toe was still causing him great pain, was infected and discharging puss and blood, that he could barely walk and that even putting on a sock was painful. Petitioner asked specifically to see a medical doctor. In response to this request, respondent McReedy wrote petitioner and alleged erroneously that during petitioner's visit to the health service unit on January 9, 2002, petitioner said his toe was better and had refused to let the nurse examine his toe. Respondent McReedy claimed that petitioner was upset because he was not able to see a medical doctor and was not getting the medication he wanted. Petitioner never refused to let the nurse examine his toe. Respondent McReedy's allegation was absurd because petitioner has continually complained about his infected toe and the pain it causes him. Petitioner never said his toe was better. Instead, he said an unrelated back problem was getting better. Prisoners who refuse medical treatment must sign a form to that effect and petitioner never signed such a form because he never refused treatment.

On January 13, 2002, petitioner submitted another request for medical attention. In this request, petitioner noted that his toe was turning purple, that he was in such significant pain that he could only limp on the outside of his foot, that his toe had been in this condition for nearly a month and that he needed to see a doctor. In response, the health service unit informed petitioner that he could "be seen for sick call as previously afforded if

you so desire." On January 23, 2002, petitioner submitted another request for medical attention, noting that his toe was still painful, discharging puss and not getting much better even though a month had passed. Petitioner was informed that he was on the list to see the part-time doctor who visits the prison.

Petitioner wrote respondent Zunker informing her that his toe was purple, swollen and discharging puss, that he was in great pain and had not been allowed to see a medical doctor. Petitioner asked that he receive appropriate medical care. Respondent Zunker wrote petitioner on January 15, 2002, telling him

> Your letter received January 14, 2002 re: Ingrown Toenail will be forwarded to both the Health Services Manager and Physician of the Kettle Moraine Correctional Institution. They will be asked to collaborate on a response in writing to you and send a copy of their letter to the Bureau of Health Services. Your consideration of the above information is appreciated.

A copy of respondent Zunker's letter was also sent to respondent Gamble. Petitioner received the promised written response from respondent McReedy (dated January 17, 2002) but in it McReedy only sought to confuse and misrepresent petitioner's situation. Respondent McReedy repeated his false allegations that petitioner had refused to let the nurse examine his toe and had told the nurse that his toe was getting better. In addition, respondent McReedy's letter informed petitioner that if he felt his toe required further evaluation, he would need to submit another request for medical assistance.

As instructed, petitioner submitted another request to have his toe treated on January

23, 2002. However, petitioner was simply told that he was "on the list" and was never further examined. As of "the date of the preparation of [petitioner's] complaint" (which I presume to be the date the complaint was signed – February 8, 2002), petitioner's toe had not been further examined and he remained in pain.

Petitioner submitted an inmate complaint concerning his inadequate treatment, but the inmate complaint examiner (presumably respondent Hermann) never contacted him personally. Respondent Hermann's report on petitioner's inmate complaint notes that he contacted respondent McReedy, who told him that petitioner had been "placed on the MD list" on January 6 because of his ingrown toe nail, that petitioner "was again seen on 01-09-02 for complaint of the toe pain" and that on that date petitioner "said his toe was better, but demanded to see the MD for his neck and that he has the right to see the MD now." This merely reiterated what respondent McReedy had written to petitioner. Respondents Gamble and Hermann have an unwritten policy of failing to act favorably on inmate complaints. Respondent Gamble is grossly negligent in supervising the subordinates who have committed wrongful acts against petitioner.

OPINION

A. Section 1983

Before addressing the merits of petitioner's complaint, there is an initial issue to be

considered. Section 1983 creates a federal cause of action for "the deprivation under color of [state] law, of a citizen's rights, privileges, or immunities secured by the Constitution and laws of the United States." Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997) (citations omitted). To prevail on a § 1983 claim, a plaintiff must prove that (1) the defendant deprived him of a right secured by the Constitution or laws of the United States; and (2) the defendant acted under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

To establish individual liability under § 1983, petitioner must allege that the individual respondents were involved personally in the alleged constitutional deprivation or discrimination. Under § 1983, individual respondents cannot be held liable under a theory of respondeat superior. Hearne v. Board of Education of City of Chicago, 185 F.3d 770, 776 (7th Cir. 1999). "'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) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir.1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."). It is not necessary that the respondent participate directly in the deprivation. The official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of

plaintiff's 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). See also Kelly v. Municipal Courts of Marion County, Indiana, 97 F.3d 902, 908 (7th Cir. 1996); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

On the basis of this authority, respondents Gamble and Hermann must be dismissed. Petitioner alleges that respondent Gamble received a copy of a letter from respondent Zunker regarding petitioner's ingrown toe nail, but the letter, attached to petitioner's complaint, is three sentences long and contains no details about petitioner's medical situation. Likewise, petitioner's bare allegation that respondent Gamble, in her capacity as prison warden, negligently supervised the prison's medical staff does not suffice to demonstrate that she was personally involved in denying petitioner his constitutional rights. Duncan v. Duckworth, 644 F.2d 653, 656 (7th Cir. 1981). The same is true of petitioner's nebulous allegation that respondent Gamble has an unwritten policy of failing to act on inmate complaints. Petitioner has not alleged that respondent Gamble personally denied his inmate complaint.

In addition, petitioner has pled himself out of court with respect to respondent Hermann. Petitioner alleges that respondent Hermann failed to investigate his inmate complaint, but this is belied by the report prepared by Hermann which is attached as exhibit H to petitioner's § 1983 complaint. The report responds to petitioner's inmate complaint

submitted on December 28, 2001. The report, issued on January 14, 2002, indicates that respondent Hermann questioned respondent McReedy on January 10, 2002, about petitioner's complaint that his toe was not being treated, and was informed that petitioner's toe was treated as recently as January 9, 2002. Even petitioner, in his § 1983 complaint, concedes that on January 5, 2002, his toe was examined by medical staff and he received anti-biotic cream and bandages. Compl., at 5, ¶16. This chronology of events, which indicates that petitioner's toe had been treated just days before respondent Hermann investigated petitioner's complaint and issued his report, shows that Hermann did not know of any deprivation of petitioner's constitutional rights.

B. Eighth Amendment

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Therefore, 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). Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d

1364, 1369 (7th Cir. 1997). Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371.

The Supreme Court has held that deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91. Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard is characterized by 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). However, courts must "examine the totality of an inmate's care when considering whether that care evidences deliberate indifference to his serious medical needs." Gutierrez, 111 F.3d at 1375.

Although it is unlikely that an ingrown toe nail, by itself, would constitute a serious medical need for purposes of the Eighth Amendment, petitioner alleges that his ingrown toe

nail became infected, caused his toe to swell, bleed and discharge puss and caused him to suffer great pain and difficulty walking. Petitioner was ordered by prison medical staff to soak and bandage his toe and was given "Beta-sep," an antibiotic ointment. Compl. at 5, ¶16; Ex. G. The Seventh Circuit has noted that "'a serious medical need is one that has been diagnosed by a physician as mandating treatment'" or one that "'a reasonable doctor or patient would find important and worthy of comment or treatment.'" Id. at 1373 (citations omitted). Petitioner's allegations are sufficient to demonstrate he had a serious medical need.

The facts alleged in petitioner's complaint make it a close question whether respondents McReedy and Zunker were deliberately indifferent to his injury. Petitioner alleges that he first contacted the health services unit about his toe on December 30, 2001, and was first seen by a nurse on January 5, 2002, when he was directed to soak his toe and given bandages and an antibiotic ointment. Petitioner was seen again by a nurse on January 9, 2002. On January 13, 2002, petitioner asked to see a doctor again, and was told he would be seen on sick call if he so desired. Petitioner's next request for treatment came on January 23, 2002. In response, he was told he was on the list to see the prison's part-time physician. However, petitioner alleges that as of February 8, 2002, the date he signed his complaint, his toe had not been further examined or treated. Thus, petitioner alleges that despite his requests for medical treatment, his toe went without any treatment from at least January 23

to February 8, a period of more than 2 weeks, despite a serious infection that caused him great pain and difficulty walking. This was so even though petitioner made respondents McReedy and Zunker aware of his situation. Although petitioner's complaint indicates that he did receive some treatment for his toe on January 5, "a prisoner is not required to show that he was literally ignored by [prison medical] staff." Sherrod v. Lingle, 223 F.3d 605, 611 (7th Cir. 2000). At this early stage of the proceedings, the allegations in petitioner's complaint are sufficient to state a claim for deliberate indifference against respondents McReedy and Zunker.

ORDER

IT IS ORDERED that

1. Petitioner Connor Q. Savada's request for leave to proceed in forma pauperis on his deliberate indifference claim against respondents McCreedy and Zunker is GRANTED;

2. Petitioner's request for leave to proceed in forma pauperis against respondents Gamble and Hermann is DENIED and they are DISMISSED from this case;

3. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should retain 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. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' lawyers; and

4. The unpaid balance of petitioner's filing fee is $125.46; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 30th day of May, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge