

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

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ROBERT E. SALLIE,

Petitioner,

ORDER

v.

02-C-0063-C

JON E. LITSCHER, GERALD BERGE,  
PAMELA BARTELS and RICHARD M.  
LOFTHOUSE,

Respondents.  
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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Robert E. Sallie, who is currently an inmate at the Wisconsin Resource Center in Winnebago, Wisconsin, alleges that while incarcerated at the Supermax Correctional Institution, respondents were deliberately indifferent to his dental needs in violation of the Eighth Amendment by not completing his partial denture for almost 14 months after two teeth had been extracted. In addition, petitioner has filed motions to (1) consolidate this case with Jones 'El v. Berge, case no. 00-C-0421-C; (2) certify this action as a class action; and (3) appoint counsel.

Petitioner seeks leave to proceed pursuant to 28 U.S.C. § 1915. Because petitioner

had no means with which to pay an initial partial payment, he was required to advise this court in writing before February 26, 2002, whether he wished to withdraw his request for leave to proceed or else be obligated to pay the \$150 filing fee, even if this court determines that he will not be permitted to proceed with his complaint in forma pauperis. Petitioner did not withdraw his request. Therefore, although petitioner has not made the initial partial payment required under § 1915(b)(1), he is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

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, the prisoner's complaint must be dismissed if, even under a liberal construction, it 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. See 42 U.S.C. § 1915e.

Because I find that petitioner fails to state a claim upon which relief can be granted, he will be denied his request for leave to proceed in forma pauperis.

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

#### ALLEGATIONS OF FACT

Petitioner Robert E. Sallie is currently an inmate at the Wisconsin Resource Center in Winnebago, Wisconsin. As all times relevant to this complaint, petitioner was an inmate

at the Supermax Correctional Institution in Boscobel, Wisconsin. Respondent Jon Litscher is secretary of the Department of Corrections. Respondent Gerald Berge is warden of Supermax. Respondent Pamela Bartels is manager of the Health Services Unit and respondent Richard M. Lofthouse is a dentist at Supermax.

On December 22, 1999, petitioner had two teeth extracted by Dr. Hanson, a dentist at Supermax Correctional Institution, who noted in his dental report, “suggest add to partial or process new partial.”

On February 24, 2000, petitioner wrote a letter to respondent Bartels regarding the work on his denture. She did not respond.

On March 14, 2000, petitioner wrote to respondent Bartels asking her to address his dental needs. Petitioner informed respondent Bartels that he had problems chewing his food and that his gum was sore and painful because he was not able to wear his denture when he chewed food. She did not respond.

On June 6, 2000, petitioner wrote to respondent Bartels asking her to address his dental needs and informing her that if she did not respond to this request he would write to the warden. She did not respond.

On June 15, 2000, petitioner wrote to respondent Bartels stating that his gum was sore and tender where it came in contact with his top “chewer” tooth while chewing on hard and sharp foods. She did not respond.

On June 19, 2000, petitioner wrote respondent Berge regarding respondent Bartels's refusal to respond to his letters. Petitioner informed respondent Berge that his gum was sore and that he was experiencing pain because his partial denture did not stay in his mouth when he chewed food. Petitioner did not receive a response.

On June 25, 2000, petitioner submitted a dental service request stating that he cannot wear his denture when he eats and, as a result, his gum is being affected.

On July 8, 2000, petitioner filed an inmate complaint (SMCI-2000-19899) stating that his dental treatment was being delayed by respondent Bartels and that he was in pain. On July 10, 2000, the inmate complaint examiner dismissed petitioner's complaint, concluding that the dentist "is working on a priority basis, starting with emergencies and going from there." On August 24, 2000, respondent Litscher affirmed the dismissal.

On July 11, 2000, petitioner submitted a dental service request stating that his gum is irritated from chewing food without his denture.

On July 13, 2000, respondent Lofthouse saw petitioner and refused to complete the work Hanson had started. Respondent Lofthouse disregarded Hanson's notation to "add to partial or process new partial." Petitioner informed respondent Lofthouse that he could not chew his food properly and that his gum was sore. Respondent Lofthouse told petitioner, "I am here once a week for two hours and can only treat for now priority cases and your case is not a priority."

On July 17, 2000, petitioner wrote to respondent Berge again because Berge did not respond to his June 19 letter. Petitioner informed Berge that his dental needs were not being addressed sufficiently, that he could not chew his foods properly and that respondent Lofthouse did not consider his denture work a priority.

On July 27, 2000, petitioner received his June 19 and July 17 letters back from respondent Berge. Petitioner forwarded these letters to respondent Bartels. That same day, petitioner filed an inmate complaint (SMCI-2000-21108) stating that respondent Lofthouse did not address his dental needs sufficiently. On August 28, 2000, petitioner's complaint was dismissed because "complainant's medical record clearly states he was seen by the dentist on 7/14/00 and it was 'explained to patient a new denture is indicated but isn't a priority. Will put him on the list to get a denture.'" Petitioner appealed this decision. On October 6, 2000, respondent Litscher affirmed the dismissal.

On August 21, 2000, petitioner submitted a dental service request stating that he was experiencing pain and soreness. Petitioner did not receive a response.

On August 28, 2000, petitioner submitted a dental service request to respondent Lofthouse stating that his gum was sore because his denture could not be in his mouth when he chewed food. That same day, petitioner filed an inmate complaint (SMCI-2000-24879) because his denture was not being worked on. On September 5, 2000, petitioner's complaint was dismissed. Petitioner appealed this decision.

On September 7, 2000, petitioner submitted a dental service request to respondent Lofthouse stating that he was experiencing pain and soreness.

On September 9, 2000, respondent Lofthouse saw petitioner and Lofthouse told him that “your case is a priority now and I am recommending that you need the work done for a new partial.”

On September 26, 2000, petitioner submitted a dental service request stating that he was experiencing pain and soreness.

On October 4, 2000, petitioner submitted a dental service request stating that he was experiencing pain and soreness. Respondent Lofthouse responded by telling petitioner he could obtain medication from the canteen. On October 8, 11, 15 and 20, 2000, petitioner submitted a dental request to respondent Lofthouse stating that he is indigent and cannot go to the canteen for medication and that the medication must come from the health services unit. Petitioner did not receive a response to these requests.

On October 23, 2000, petitioner filed an inmate complaint (SMCI-2000-30487) regarding the denial of medication for his sore gum. On November 18, 2000, petitioner’s complaint was dismissed. Respondent Litscher affirmed the dismissal.

On or about October 25, 2000, respondent Lofthouse saw petitioner and prescribed him medication.

On November 26 and December 4, 2000, petitioner submitted a dental services

request to respondent Lofthouse requesting to have his medication refilled. Petitioner did not receive a response.

On December 4, 2000, petitioner filed an inmate complaint (SMCI-2000-36023) regarding the 10-day delay in having his medication refilled. Respondent Litscher affirmed the inmate complaint examiner's dismissal.

On December 20, 2000, respondent Litscher rejected the inmate complaint examiner's dismissal of complaint SMCI-2000-24789 (filed August 28, 2000). Respondent Litscher stated, "While I am informed that [petitioner's] teeth were pulled in December and he has been seen four times for fitting and color match, I am concerned about the delay." Respondent Litscher referred petitioner's complaint to the DAI Assistant Administrator to take appropriate action.

On January 8, 2001, petitioner received his partial denture after enduring pain, soreness and suffering for almost 14 months.

## OPINION

Petitioner alleges that respondents were deliberately indifferent to his serious dental needs in violation of the Eighth Amendment by not completing his partial denture for nearly 14 months after two teeth had been extracted. 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 of cruel and unusual punishment, “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 establish 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). See id. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). In 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. See Gutierrez, 111 F.3d at 1371, 1373. (“‘serious’ medical need is one that has been diagnosed by a physician as mandating treatment”).

Petitioner alleges that he experienced gum pain and soreness when he chewed on “hard and sharp” foods because respondents did not provide him with a needed partial denture. Petitioner’s allegations simply do not rise to the level of a serious medical need. Petitioner had pain and soreness only in the gum area that had the two missing teeth and only after chewing on hard and sharp foods. Petitioner could have eliminated his gum pain and soreness by not chewing on hard and sharp foods in the area of his mouth that were



missing teeth or by avoiding hard and sharp foods altogether.

Even if petitioner's intermittent gum pain was considered a serious medical need, petitioner fails to show that respondents were deliberately indifferent to that need. 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. 824, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91. Deliberate indifference in the denial or delay of medical care can be shown by a respondent's actual intent or reckless disregard. Reckless disregard is highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. See Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

The essential question is whether the delay of petitioner's partial denture is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition," Snipes, 95 F.3d at 592, thus giving rise to a claim of deliberate indifference. It is not. Petitioner was seen by a dentist four times for fittings and color matches for his partial. Such dental care does not suggest deliberate indifference and is not blatantly inappropriate.

Because petitioner's complaint fails to state a claim upon which relief can be granted, his request for leave to proceed in forma pauperis will be denied. As a result, it is unnecessary to discuss petitioner's motions to consolidate this case with Jones 'El v. Berge, certify a class or appoint counsel.

ORDER

IT IS ORDERED that

1. Petitioner Robert E. Sallie's request for leave to proceed in forma pauperis is DENIED for failure to state a claim upon which relief can be granted;
2. The unpaid balance of petitioner's filing fee is \$150.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2);
3. A strike will be recorded against petitioner pursuant to § 1915(g); and
4. The clerk of court is directed to close this file.

Entered this 12th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge