IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD LEE BRUSHWOOD,

Petitioner,

v.

JON E. LITSCHER, Secretary (DOC),
THOMAS G. BORGAN, Warden,

Respondents.

ORDER

00-C-357-C

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This is a proposed civil action for declaratory and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner is presently confined at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. He has paid the filing fee.

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. In addition, under most circumstances, a prisoner's request for leave to proceed must be denied if the prisoner has failed to exhaust available administrative remedies.

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

ALLEGATIONS OF FACT

On April 27, 1999, petitioner filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Wisconsin in Milwaukee. In the petition, petitioner requested that he not be transferred to an out-of-state prison because he had medical problems involving cancer and such a transfer would be illegal. The petition was denied by the district court on May 17, 1999. On July 15, 1999, petitioner's appeal to the Court of Appeals for the Seventh Circuit was dismissed for failure to timely pay the required docketing fee.

On February 3, 2000, petitioner was notified by authorities at Fox Lake Correctional Institution that he was scheduled for transfer to the Tennessee private prison system on February 8, 2000. On February 8, 2000, petitioner was transferred to a Tennessee private prison. At that time, petitioner had an acute throat condition that was diagnosed as cancer, other medical conditions and pain. Respondents had knowledge of petitioner's conditions. Petitioner did not receive any medical treatment during the thirty days he was outside

Wisconsin. This enhanced petitioner's already acute medical condition. Petitioner had to contact Mr. Larry Westover to contact the Health Services Bureau of Health Services to be transferred back to Wisconsin. On March 13, 2000, petitioner was returned to Wisconsin after being notified that his cancer had advanced to mass swelling of the right neck and the private prison could not provide any treatment for petitioner.

DISCUSSION

I. INADEQUATE MEDICAL TREATMENT

To state a claim of cruel and unusual punishment arising from the lack of medical treatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). 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); see also Snipes v. Detella, 95 F.3d 586, 590-91 (7th Cir. 1996). To be deliberately indifferent a prison 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). It is not enough that he "should have known" of the risk. Rather, the official must know there is a risk and consciously disregard it. See

Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508, 511 (7th Cir. 1999).

Inmates have serious medical needs within the meaning of Estelle if they are suffering from medical conditions generally considered as life-threatening or as carrying risks of permanent, serious impairment if left untreated. Even if inmates are not facing death or permanent harm, prison officials violate the Eighth Amendment if the failure to provide medical care constitutes a "denial of the minimal civilized measure of life's necessities," Farmer, 511 U.S. at 834 (1994), or "an unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 105. Petitioner alleges facts suggesting that he had a serious medical need.

In Farmer, 511 U.S. at 839-40, the Supreme Court defined deliberate indifference as recklessness in the criminal law sense, that is, recklessness implying "an act so dangerous that the defendant's knowledge of the risk [of harm resulting from the act] can be inferred." Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985). An official is deliberately indifferent when he acts or fails to act "despite his knowledge of a substantial risk of serious harm." Farmer, 511 U.S. at 842. Petitioner alleges that respondents knew about his medical condition, and it is possible that he will be able to prove that respondents knew he would be unable to get adequate care at the Tennessee prison. In order to succeed at trial, petitioner would have to prove that respondents had actual knowledge of his medical condition and knew that he would not receive adequate care for that condition in Tennessee.

However, even though petitioner may have alleged facts sufficient to state a claim that respondents were indifferent to his serious medical need in violation of the Eighth Amendment, I cannot allow him to proceed because he has not submitted documentation that he has exhausted his available administrative remedies as required by 42 U.S.C. § 1997e(a). Under the Prisoner Litigation Reform Act, an inmate cannot proceed in a civil rights lawsuit until he or she has submitted to the court the inmate complaint, the superintendent's response, the appeal to the complaint examiner and the final decision of the Secretary of the Division of Corrections.

Because petitioner has not provided documentation that he exhausted his administrative remedies on this claim, I will give him an additional two weeks to submit proof of exhaustion. Petitioner indicates that he complained to the social service department that he should not be transferred because he had a case pending in federal court. He also attaches an Institution Complaint Examiner receipt indicating receipt of a complaint challenging his out-of-state placement. However, I cannot tell from the receipt the grounds on which petitioner challenged his placement. In order to have exhausted his administrative remedies, petitioner must have followed the inmate grievance procedure; complaining to the social service department is not sufficient. He must have specifically challenged his transfer on the ground that he was unable to receive adequate medical care and not solely that he should not have

been transferred because he had a pending lawsuit or because out-of-state transfers are always illegal. Petitioner must provide documentation that he has exhausted his administrative remedies, including a copy of both the complaint he submitted through the inmate complaint review system and the response he received. The administrative exhaustion requirement applies to petitioner's state negligence and federal Eighth Amendment claims.

II. TRANSFER TO OUT-OF-STATE FACILITY

Petitioner requests a declaration that respondents "illegally transferred petitioner across state lines." "A prisoner has no due process right to be housed in any particular facility." Whitford v. Boglino, 63 F.3d 527, 532 (7th Cir. 1995); see also Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (a prisoner has no legally protected interest "in [his] keeper's identity"). In Pischke, the court of appeals concluded that the housing of Wisconsin prisoners with private prisons in other states did not violate the Thirteenth Amendment. See 178 F.3d at 500. In addition, the court stated that it could not "think of any other provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government." Id. Moreover, the judgment of the Dane County Circuit Court in Evers v. Sullivan, No. 98 CV 2282, declaring that the Wisconsin Department of Corrections lacks legal authority to transfer Wisconsin prisoners to

out-of-state housing without their consent was reversed by the Wisconsin Court of Appeals, in Evers v. Sullivan, No. 00-0127, 2000 WL 705340 (Wis. Ct. App. June 1, 2000) (copy attached). Petitioner's claim will be dismissed on the ground that it is legally frivolous.

ORDER

IT IS ORDERED that a decision whether to grant petitioner Donald Lee Brushwood's request for leave to proceed on his claims that he received inadequate medical care is STAYED until August 7, 2000 in order for petitioner to submit proof of administrative exhaustion. If by August 7, 2000, petitioner fails to submit proof that he exhausted his administrative remedies before filing his proposed complaint, I will deny without prejudice petitioner's motion to proceed and direct the clerk of court to close the file. Petitioner's request for leave to proceed on his claim that the transfer of Wisconsin prisoners to private out-of-state prisons is illegal is DENIED on the ground that it is legally frivolous.

Entered this 24th day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge