

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

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HARRY LEROY GANT,

Petitioner,

v.

DANE COUNTY SHERIFF'S OFFICE and
DR. STENGER,

Respondents.

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ORDER

00-C-360-C

This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Harry Leroy Gant, who is presently confined at the Dane County jail in Madison, 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 does not have the means to make an initial partial payment of the fee for filing this lawsuit. Therefore, although he 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, 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 1, 2000, petitioner was prescribed antibiotic pills to prevent infection from a cut. Soon after he began taking the pills, his skin began to itch and burn. This sensation started on petitioner's back and spread to his hands, legs, arms and other parts of his body. On more than one occasion, petitioner told the nurse about his symptoms. One nurse indicated that she would prescribe cortisone cream but instead referred him to the doctor. On May 1, 2000, petitioner saw respondent Dr. Stenger, who took petitioner's vital signs and dismissed

him from her office because he did not have a visible skin rash. Petitioner told respondent, "I'm black, dark skinned and although no rash can be seen I did feel some bumps or pimples on my back."

After this conversation, petitioner again informed respondent Stenger that he was suffering from the illness and needed medical attention. Petitioner filed a grievance and continued to submit medical request slips but was refused medical attention until he told the jail commander that he wanted to file a tort claim because his Eighth Amendment rights were being violated. Petitioner was given skin moisturizing cream. Petitioner's problem continues because the cause has not been diagnosed properly. Petitioner continues to suffer unbearable pain and agony.

DISCUSSION

I understand petitioner to allege that respondent Stenger provided him with inadequate medical treatment in violation of the Eighth Amendment. 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). Deliberate indifference may be found where "the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition,'" Snipes, 95 F. 3d at 592 (citations omitted). See also Estelle, 429 U.S. at 104 (holding that deliberate indifference "is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed").

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's allegation that he suffers from a burning and itching sensation on his skin does not rise to the level of a serious medical need within the meaning of Estelle.

Furthermore, even assuming that petitioner's itching and burning was a serious medical need, he has failed to show that respondent Stenger was deliberately indifferent to that 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. Whether delaying treatment constitutes deliberate indifference is a function of both the seriousness of the medical condition and the length of the delay. See, e.g., Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996). The delay must have caused additional injury. See id. at 1240-41. Petitioner alleges that the nurse referred him to a doctor, respondent Dr. Stenger. Petitioner alleges that when he met with respondent, he had no visible rash but could feel bumps or pimples on his back. Respondent's determination that petitioner did not need medical attention cannot be said to be deliberate indifference. Therefore, petitioner has failed to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Petitioner Harry Leroy Gant's request for leave to proceed in forma pauperis on his claim under the Eighth Amendment is DENIED with prejudice for petitioner's failure to state a claim upon which relief may be granted and this action is DISMISSED;

2. The unpaid balance of petitioner's filing fee is \$150; this amount is to be paid in monthly payments according to 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 enter judgment and close the file.

Entered this 6th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge