IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PATRICK A. FLAYTER,

OPINION AND ORDER

Plaintiff,

00-C-429-C

v.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS; MICHAEL J. SULLIVAN, Secretary, Department of Corrections; SHARON ZUNKER, Director of Bureau of Correctional Health Services; DR. THOMAS MALLOY, Medical Consultant; DR. GEORGE M. DALEY, Medical Consultant; DR. VICTOR GUZMAN, Treating Physician; PAT SIEDSCHLAG, Manager of Health Services Unit; CONNIE WIERSMA, Program Assistant for Health Services Unit; JEFFREY ENDICOTT, Warden at Columbia Correctional Institution; and DR. ROBERT COONEY, Treating Physician.

Defendants.

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This is a proposed civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Patrick Flayter is presently confined at Corrections Corporation of America - Hardeman County Correctional Facility in Tennessee. He contends

that defendants violated his rights by failing to provide him with adequate medical treatment in violation of his Eighth Amendment rights, by transferring him to a private institution, by failing to provide him a reasonable accommodation under the Americans with Disabilities Act, by conspiring against him, by rejecting his inmate grievance, by refusing to grant him full access to his medical records and by violating provisions of the contract between the Corrections Corporation of America and the Wisconsin Department of Corrections. Although plaintiff has paid the full fee for filing his complaint, he seeks leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 for the purpose of requiring the U.S. Marshal to serve his complaint on defendants. Because plaintiff's complaint will be dismissed, I need not decide whether he qualifies for indigent status because his complaint will not be served.

Because plaintiff is a prisoner and defendants are "employee[s] 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). 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. It is unnecessary to determine whether plaintiff exhausted his administrative remedies because his complaint will be dismissed. See 42 U.S.C. § 1997e(c)(2). Subject matter jurisdiction is present. See 28

U.S.C. §§ 1331 and 1367(a).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972). In his proposed complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

At all times relevant to this lawsuit, plaintiff Patrick Flayter has been a prisoner of the State of Wisconsin. Since March 21, 1998, plaintiff has been an inmate at Corrections Corporation of America -Hardeman County Correctional Facility in Whiteville, Tennessee. Except for defendant Thomas Malloy, all defendants were employed by the Wisconsin Department of Corrections from September 1992 until March 20, 1998. Defendant Malloy was employed by the department from September 1992 until March 1993. Defendant Victor Guzman was involved in plaintiff's treatment from September 1992 through September 1997 and defendant Robert Cooney was involved in December 1993.

B. Prior Medical History

Plaintiff summarizes the background of his medical conditions and treatment prior to

his incarceration, including a work-related accident.

C. Milwaukee County Jail: March 17, 1991 - July 30, 1992

On March 17, 1991, plaintiff was arrested and had an examination for medical clearance. On June 10, 1991, plaintiff saw Dr. Bain. On August 2, 1991, plaintiff saw Dr. Casanova. On September 21, 1991, plaintiff visited the pain clinic and saw Dr. Lynch and Dr. Hogan. On November 4, 1991, plaintiff visited the pain clinic and saw Dr. Hogan. On January 29, 1992, plaintiff saw a thoracic surgery doctor, Dr. Carrera, who took x-rays and prescribed medications for plaintiff. On February 3, 1992, plaintiff met with Dr. Haasler. On February 7, 1992, plaintiff had a scan of his upper gastrointestinal track and an esophagram. On February 13, 1992, plaintiff saw Dr. Voss for a court-ordered physical. On February 14, 1992, plaintiff saw Dr. Haasler. On February 26, 1992, plaintiff had a stress test. On April 9, 1992, plaintiff met with Dr. Haasler. Dr. Haasler wanted to conduct an exploratory operation on plaintiff but he did not perform the surgery because it was too close to plaintiff's trial date. Dr. Haasler prescribed plaintiff's medications from April 9, 1992 until July 30, 1992 and told plaintiff that he could take these medications for up to five or six years to control his pain and avoid surgery.

D. Dodge Correctional Institution: July 30, 1992 - September 28, 1992

On July 30, 1992, plaintiff arrived at Dodge Correctional Institution and had his medical history taken. Plaintiff left Dodge on September 28, 1992.

E. Columbia Correctional Institution: September 28, 1992 - March 25, 1998

On September 29, 1992, plaintiff saw Dr. John Pellet, the chief of thoracic surgery at the University of Wisconsin - Madison. Plaintiff and Dr. Pellet agreed that plaintiff would not have surgery because the medications were controlling plaintiff's pain problems. Plaintiff told Dr. Pellet that he was not taking all of his prescribed medications at that time. In a letter dated October 5, 1992 to staff at Columbia, Dr. Pellet wrote, "I saw Patrick Flayter, in the follow-up thoracic surgery clinic on Tuesday September 29, 1992. He has a multitude of complaints and has seen numerous doctors at various institutions. In my opinion we should not do any further surgical procedures on him and he definitely should be seen by Pain Clinic management team."

On October 14, 1992, plaintiff was told that he had a scheduled appointment at UW -Madison; he was then told that the appointment had been canceled. Defendant Guzman had canceled plaintiff's October 14 appointment on October 5, 1992. Plaintiff knew he had an appointment in the Gastrointestinal Clinic at 2:00 p.m. on that day but he thought the

appointment that was canceled might have been in the pain clinic. On October 7, 1992, defendant Guzman submitted a request for plaintiff to go to the pain clinic to defendant Malloy, the medical consultant for the Bureau of Corrections Health Services. In a letter dated October 12, 1992, defendant Malloy classified plaintiff's treatment as class III-B, meaning that the requested treatment was elective.

On December 10, 1992, the medical department at Columbia Correctional Institutional allowed plaintiff to get his "tens pain control unit," a transcutaneous electro-nerve stimulator.

On January 26, 1993, defendant Guzman submitted a second request to defendant Guzman for plaintiff to go to the pain clinic. On January 28, 1992, plaintiff had an appointment with defendant Guzman. On February 1, 1993, defendant Malloy wrote defendant Guzman, stating that plaintiff's treatment was elective and did not need to be scheduled at this time. On April 28, defendant Dr. George Daley denied the request for plaintiff to go to the pain clinic, classifying the request as III-B.

On June 17, 1993, plaintiff reviewed his medical records. When plaintiff came across Dr. Haasler's notes, defendant Wiersma told him that the time allotted for him to review his records had expired. Defendant Siedschlag conspired with others to remove documents from plaintiff's medical files. Defendant Wiersma conspired with others to keep important medical information from plaintiff.

On July 12, 1993, plaintiff saw a doctor about his medical problems.

On August 24, 1993, plaintiff wrote the custodian of medical records in Milwaukee to request his medical records because he was having difficulty getting them at Columbia. On or about September 8 or 9, 1993, the custodian sent plaintiff his records. Defendant Siedschlag conspired with correctional officers in the mail room to intercept plaintiff's medical records. Upon the arrival of plaintiff's medical records, defendant Siedschlog opened them without plaintiff's permission.

On November 9, 1993, plaintiff had an endoscopy at the University of Wisconsin - Madison Clinic. The clinic recommended that plaintiff have an abdominal ultrasound. On November 22, 1993, defendant Guzman submitted a request to defendant Daley for plaintiff to have an ultrasound. On November 29, 1993, defendant Daley classified the ultrasound as class III-A and stated that arrangements for the treatment should be made.

On December 16, 1993, plaintiff went to the health services unit to see defendant Cooney for a scheduled appointment. On December 29, 1993, plaintiff was called to the health services unit to see defendant Daley. Following an examination, defendant Daley decided to take plaintiff off Flexeril and Darvocet, but continued plaintiff's prescription for Motrin.

On March 24, 1994, defendant Daley approved the request for plaintiff to have a cholocystectomy, a procedure to remove his gallbladder. On May 30, 1994, plaintiff had a

cholocystectomy. After the procedure, plaintiff continued to have chest pains but he stopped vomiting after meals.

On June 6, 1995, defendant Daley classified plaintiff's request to go to the pain clinic as elective. Plaintiff had problems having prescriptions refilled in a timely manner. Defendant Siedschlag conspired with her nursing staff to delay or interfere with plaintiff's receipt of refills for his prescription medicine. On November 30, 1995, June 12, 1996, July 11, 1996, September 9, 1996 and February 12, 1997, defendant Guzman refilled plaintiff's prescriptions for six months.

On August 29, 1997, plaintiff requested an accommodation under the Americans with Disabilities Act. Specifically, plaintiff asked that he not have to wear a dust mask while he worked because of a breathing problem. After filing his request, plaintiff's supervisor told him that he could not go to work until he saw the doctor about a "non-hazardous duty restriction" relating to plaintiff's inability to move equipment. On September 22, 1997, plaintiff asked to see a doctor about the restriction. On September 23, 1997, plaintiff asked about his request to be excepted from the dust mask requirement. In a letter dated September 24, 1997, Sue DeHaan wrote:

> It has further come to my attention that you have a non-hazardous duty restriction, which according to Pat Siedschlog, precludes you from working with moving equipment. This restriction will also need to be addressed through [the health services unit], to either define the non-hazardous duty restriction, or to

> remove the restriction, if warranted.
>
> . . .
>
> Until these concerns are addressed, you will not be called to work in the woodworking project when power tools are in use. I trust that you understand that this precaution is necessary for your safety. I apologize that the non-hazardous duty restriction has not been considered until now.

Plaintiff was not able to see a doctor because there was no doctor at the institution. After plaintiff saw a doctor, he went back to work and there was no change in his medical classification.

On June 25 and 26, 1997, plaintiff asked for sunglasses to wear back and forth to the visiting room. On August 26, 1997, plaintiff saw an eye doctor for his cataracts. On September 16, 1997, plaintiff was authorized to wear sunglasses to the visiting room.

On March 16, 1998, plaintiff filed an inmate complaint, in which he complained that he was receiving inadequate medical care. On March 25, 1998, defendant Endicott dismissed his complaint.

F. Hardeman County Correctional Facility: March 21, 1998 - present

On March 20, 1998, plaintiff was transferred to Hardeman County Correctional Facility. Plaintiff received defendant Endicott's March 25, 1998 dismissal of his inmate complaint on April 2, 1998, a few days past the required time to file an appeal. On or about May 23, 1993, plaintiff received the appropriate form to appeal the dismissal of his complaint.

At that time, he filed a request for a review by the corrections complaint examiner. On June 1, 1998, defendant Sullivan affirmed defendant Endicott's dismissal, stating that the appeal was untimely and that it was moot because plaintiff had been transferred.

On March 21, 1998, plaintiff saw a doctor. At this time, plaintiff was receiving 200 milligrams of ibuprofen. On May 12, 1998, plaintiff saw the doctor for the eighth time. On May 20, 1998, plaintiff went to the West Tennessee Orthopedic and Sports Medical Clinic in Jackson, Tennessee. At the clinic, plaintiff saw Dr. Keith Nord, who took radiographs and x-rays. On June 3, 1998, plaintiff was given permission to have his "tens pain control unit," a heating pad, a sitz bath, an extra pillow and a chair.

On September 11, 1998, plaintiff was grabbed and thrown against the wall in the kitchen area and in the hallways leading to the medical area. Members of the SORT team beat plaintiff with their forearms on the left side of his back and his left neck and shoulder area. Plaintiff was beaten for telling one of the members of the SORT team that he could have only two packets of ketchup with his meal. The beating took place in front of the staff and other inmates. On August 5, 1999, plaintiff filed a complaint in the United States District Court for the Middle District of Tennessee, Case No. 3:99-0707, in which he complained that he was beaten by members of the SORT team.

OPINION

I. SCREENING

A. Eighth Amendment: Inadequate Medical Treatment

Plaintiff's central claim is that defendants violated his rights under the Eighth Amendment by providing him with inadequate medical treatment. 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, plaintiff 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). See 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. See 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, 511 U.S. at 837. 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, 95 F.3d at 590-91; Franzen, 780 F.2d at 652-53. 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. See Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Although the specifics of plaintiff's medical needs are not entirely clear from his 116-page complaint, it appears that plaintiff has a wide variety of health complaints, including a compression fracture, pain in his ribs and the area of his left back, neck and shoulder. Regardless whether plaintiff's allegations are sufficient to demonstrate that he had a serious medical need, plaintiff has failed to allege facts to support a finding that any of the defendants were deliberately indifferent to any of his medical needs. (It appears from plaintiff's complaint that his Eighth Amendment claim includes the period between September 28, 1992 and the present.)

While plaintiff was at Columbia Correctional Institution and Hardeman County Correctional Facility, he saw a thoracic surgeon on at least one occasion, a doctor at least six times for his various medical problems, an eye doctor for his cataracts and visited an orthopedic and sports medicine clinic on one occasion. Although defendant Guzman's requests for plaintiff to go to a pain clinic were classified as elective, plaintiff was approved for an ultrasound and he had an endoscopy, x-rays and radiographs. Plaintiff was allowed to use his "tens pain control unit" at Columbia and Hardeman; at Columbia he was allowed to use sunglasses for his cataracts; and at Hardeman he was allowed to use a heating pad, to take sitz baths and to use an extra pillow and a chair. In addition, plaintiff received prescriptions for many drugs, including pain killers such as Darvocet and Motrin and muscle relaxers such as Flexeril. Although plaintiff alleges that he had trouble having his prescriptions refilled in a timely manner, he also alleges that defendant Guzman refilled the prescriptions for six-month periods five different times. Finally, plaintiff had a cholocystectomy to remove his gallbladder, which stopped his vomiting after meals.

Plaintiff's allegations that defendants were deliberately indifferent to his medical needs demonstrate the opposite. Plaintiff fails to allege any facts to support an inference that any of the defendants knew that he was suffering from serious medical conditions and recklessly disregarded such conditions, resulting in needless pain and suffering. On the contrary,

defendants made multiple appointments with a variety of doctors, conducted diagnostic tests, allowed plaintiff special privileges to help alleviate his pain, performed an essential procedure and although they failed to schedule an appointment for plaintiff in the pain clinic, prescribed pain killers and other medication for him throughout his incarceration. Plaintiff has failed to allege facts to support an inference that any delay in his treatment can be attributed to defendants' willful neglect or reckless disregard. Even though plaintiff may disagree with the course of treatment he received, such a disagreement does not rise to the level of deliberate indifference. See Snipes, 95 F.3d at 590. "A prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition.'" Id. at 592. Plaintiff was not entitled to whatever treatment he desired; he is entitled only to the level of treatment that meets the standards of the Eighth Amendment. He received such treatment. Accordingly, his Eighth Amendment claim will be dismissed for his failure to state a claim upon which relief may be granted.

B. Illegal Transfer

I understand plaintiff to allege that defendants violated his rights under the due process clause of the Fourteenth Amendment by transferring him to a privately owned prison in

Tennessee. "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. Thus, plaintiff's claim that such a transfer violates the Fourteenth Amendment lacks legal merit.

C. Americans With Disabilities Act

The Supreme Court has held that the ADA applies to state prisons. See Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998). However, the Court of Appeals for the Seventh Circuit has held that claims brought against state officials or state agencies by private individuals under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 - 12213 in federal court are barred by the Eleventh Amendment. See Stevens v. Illinois Dept. of Transportation, 210 F.3d 732 (7th Cir. 2000); Erickson v. Board of Governors of State Colleges and Universities, 207 F.3d 945 (7th Cir. 2000).

With two exceptions, the Eleventh Amendment prohibits suits against the state by citizens of another state or by the state's own citizens for monetary damages or equitable relief. See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999). First, a state may waive the protections of the amendment and consent to suit in federal court. See Clark v. Barnard, 108 U.S. 436, 447-448 (1883); see also Florida Prepaid Postsecondary Educ., 527 U.S. 627 (repudiating the doctrine of constructive waiver). Second, Congress may use its enforcement powers under the Fourteenth Amendment to abrogate the state's Eleventh Amendment immunity through an unequivocal expression of its intent to do so and pursuant to a valid exercise of power. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

In Erickson, 207 F.3d at 952, the Seventh Circuit held that because the ADA does not enforce the Fourteenth Amendment, "the Eleventh Amendment and associated principles of sovereign immunity block private litigation against states in federal court" under the act. In Stevens, 210 F.3d at 741, the court reiterated that "[s]tates are entitled to Eleventh Amendment immunity for suits brought by individuals under the ADA" in federal court. Plaintiff alleges that defendant State of Wisconsin Department of Corrections is liable for violating his rights protected by the ADA by failing to provide him with a reasonable accommodation. That claim is barred by the Seventh Circuit's holding in Erickson and Stevens.

Similarly, plaintiff cannot bring a claim under the ADA against any of the individual defendants because the Seventh Circuit has held that "individuals who do not otherwise meet the statutory definition of 'employer' cannot be liable under the ADA." EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995). Accordingly, plaintiff's claims against defendants under the ADA will be dismissed as being without legal merit.

D. Conspiracy

Plaintiff alleges that defendant Siedschlag conspired with her nursing staff to delay or interfere with plaintiff's receipt of refills for his prescription medicine, that she conspired with correctional officers in the mail room to intercept plaintiff's medical records and that she conspired with others to remove documents from plaintiff's medical files. He also alleges that defendant Wiersma conspired with others to keep important medical information from plaintiff. To establish a claim of civil conspiracy, plaintiff must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Claims of conspiracies to effect deprivations of civil or

constitutional rights may be brought in federal court under § 1983. A bare allegation of conspiracy is insufficient to support a conspiracy claim. See Ryan v. Mary Immaculate Queen Center, 188 F.3d 857, 860 (7th Cir. 1999). Rather, a plaintiff must allege facts from which a trier of fact could reasonably conclude that a meeting of the minds occurred among all members of the conspiracy and that each member of the conspiracy understood its objective to inflict harm on the alleged victim. See Hernandez v. Joliet Police Dept., 197 F.3d 256, 263 (7th Cir. 1999). Nothing in plaintiff's complaint supports such an inference. Plaintiff has provided no explanation why defendant Siedschlag or defendant Wiersma would conspire with others to interfere with plaintiff's drug prescriptions or the information in his medical files. In addition, plaintiff has failed to allege when the conspiracy was formed. See Ryan, 188 F.3d at 860 ("A conspiracy is an agreement and there is no indication of when an agreement between [respondents] was formed.") Thus, plaintiff fails to state a claim of conspiracy upon which relief may be granted.

E. Other Claims

I understand plaintiff to allege that his rights were violated by the dismissal of his inmate complaint in which he complained that he was receiving inadequate medical care. Plaintiff cannot appeal the decision of the inmate complaint examiner to this court. After his appeals

were complete, his only recourse was to file a lawsuit in which he challenged his medical treatment, which he has done. Plaintiff does not have a right under the federal constitution to challenge the procedures he received under the institution's inmate grievance system or to challenge the resolution of his complaint. Accordingly, this claim will be dismissed as being without legal merit.

Although plaintiff alleges that defendants violated his rights by failing to provide him with access to his medical records at all times, I am aware of no provision of the Constitution or federal law that grants a state prisoner such right. This claim will be dismissed as being without legal merit.

F. 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 plaintiff's state law claims.

Plaintiff contends that defendants violated certain provisions of the contract between the Wisconsin Department of Corrections and the Corrections Corporation of America. As a

non-party to the contract, plaintiff does not have standing to sue for violation of the contract unless he can demonstrate that he is a third-party beneficiary to the contract by showing that the parties to the contract entered into it directly and primarily for the benefit of the third party. See Goosen v. Estate of Standaert, 189 Wis. 2d 237, 249, 525 N.W.2d 314, 319 (Ct. App. 1994). "The contract must indicate that the third-party either was specifically intended by the contracting parties to benefit from the contract or is a member of a class the contracting parties intended to benefit." Dorr v. Sacred Heart Hospital, 228 Wis. 2d 462, 597 N.W.2d 462 (Ct. App. 1999); see also Restatement (Second) of Contracts § 302(1)(b) ("intended beneficiary" if "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance"). The contract states:

> Nothing contained in this Contract or inferable from this Contract is intended to confer any rights or remedies upon any person whatsoever other than the parties named herein. Furthermore, no portion of this contract is intended to relieve or discharge the obligation of any third persons to any party to this Contract, and no provision herein contained shall be construed to give any third party any claim, action or right of subrogation against any party hereto.

The clear and unambiguous terms of the contract demonstrate that Wisconsin state prisoners, including plaintiff, were not intended to be third-party beneficiaries. As a result, plaintiff's contract claims will be dismissed as lacking legal merit.

II. MOTION FOR APPOINTMENT OF COUNSEL

Because plaintiff's case will be dismissed, his motion for appointment of counsel will be denied as moot.

ORDER

IT IS ORDERED that

(1) Plaintiff Patrick Flayter's action is DISMISSED pursuant to 28 U.S.C. § 1915A(b) on his claims relating to his transfer, access to his medical records, his inmate grievance, his request for an accommodation and any state law claims because they are without legal merit and on his claims of inadequate medical care and conspiracy for his failure to state a claim upon which relief may be granted;

(2) Plaintiff's motion for appointment of counsel is DENIED as moot; and

(3) A strike will be recorded against plaintiff in accordance with 28 U.S.C. § 1915(g).

Entered this 29th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge