IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CLINTON MOON,

Petitioner,

v.

JOE VAGUEIRO,

Respondent.

OPINION AND ORDER

00-C-620-C

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This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Pro se petitioner Clinton Moon is a state of Wisconsin prisoner confined at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Petitioner alleges that respondent Joe Vagueiro violated his rights by depriving him of adequate medical treatment and by failing to provide him with protective equipment at his work site. He 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. Subject matter jurisdiction exists pursuant to 28 U.S.C. §§ 1331, 1343(a)(3).

Because petitioner is a prisoner, his proposed complaint is subject to the Prison Litigation Reform Act, under which he is obligated to pay an initial partial payment of the full $150.00 filing fee before the court may process the complaint. Petitioner has paid an initial partial payment of $25.84.

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 respondent 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).

Petitioner will be denied leave to proceed in forma pauperis on his Eighth Amendment

claim of denial of medical care because he fails to allege facts to support a finding that respondent was deliberately indifferent to any of his medical needs. Petitioner will also be denied leave to proceed on his supplemental state law claim of negligence because I decline to exercise jurisdiction over it.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is a prisoner at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Respondent Joe Vagueiro is an employee of the Building and Services unit at the Kettle Moraine Correctional Institution.

Petitioner was assigned to work in Buildings and Services by the Program Review Committee. On March 15, 2000, petitioner was attending class as a part of his work training. During the class, petitioner was standing near a project when a window unexpectedly fell and struck his head. When petitioner developed a severe headache and began vomiting, he requested medical treatment. Later that day, petitioner was taken to the medical services unit where he was examined by Dr. Horn. Dr. Horn requested that petitioner receive further diagnostic treatment such as a cat scan at the University of Wisconsin Hospital.

On May 12, 2000, petitioner underwent a medical examination at the University of

Wisconsin Hospital. He had a cat scan that showed no evidence of intracranial hemorrhaging. Nonetheless, at least up until the date he filed his complaint in this court on September 19, 2000, petitioner was taking medication to alleviate his pain.

OPINION

From petitioner's allegations, it is possible to make out two claims: 1) that respondent Vagueiro was deliberately indifferent to petitioner's serious medical needs in violation of petitioner's Eighth Amendment rights; and 2) that respondent Vagueiro was negligent in failing to prevent petitioner from being injured while he was being trained for his job.

I. EIGHTH AMENDMENT: 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, petitioner must allege facts from which it can be inferred that he had a serious medical need (objective component) and that respondent was 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. In this case, I will assume that the blow that petitioner received to his head was traumatic and that it constituted a serious medical need. Thus, petitioner has alleged sufficient facts to meet the objective component of the Eighth Amendment requirement.

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 respondent'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). Petitioner has failed to

allege facts to support a finding that respondent was deliberately indifferent to any of his medical needs.

Petitioner requested and received medical attention on March 15, 2000, the same day that the window fell on his head. Dr. Horn, the doctor at Kettle Moraine medical services, examined petitioner and prescribed pain medication. In addition, Dr. Horn put in a request for petitioner to receive further diagnostic treatment at the University of Wisconsin Hospital. As planned, petitioner underwent a CAT scan at the UW Hospital two months later. This second exam showed no intracranial hemorrhage. At least until the date of this filing, petitioner continued to take pain medication for his headaches.

Petitioner's allegations that respondent was deliberately indifferent to his medical needs demonstrate the opposite. Petitioner fails to allege any facts to support an inference that respondent knew that he was suffering from serious medical conditions and recklessly disregarded such conditions, resulting in needless pain and suffering. On the contrary, petitioner received medical care on the same day of the accident and continued to receive pain medication at least up to the filing date of his complaint. In addition, petitioner was examined by specialists at the University of Wisconsin Hospitals for further evaluation of his head injury. Petitioner has failed to allege facts to support an inference that any delay in his treatment can be attributed to respondents' willful neglect or reckless disregard. Even though petitioner 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. Petitioner 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.

II. STATE LAW CLAIM

In addition to his Eighth Amendment claim, petitioner contends that respondent failed in his duty to provide him with protective equipment that would have prevented his injury. This claim is a tort and therefore is based on state common law.

Because petitioner has not raised a viable federal law claim, I decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over petitioner's state law claim. See 28 U.S.C. § 1367(c)(3). The Court of Appeals for the Seventh Circuit has recognized that "a district court had the discretion to retain or to refuse jurisdiction over state law claims."

Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999).

ORDER

IT IS ORDERED that

(1) Petitioner Clinton Moon's request for leave to proceed in forma pauperis is DENIED pursuant to 28 U.S.C. § 1915(e)(2)(B) as to petitioner's claim of inadequate medical treatment for petitioner's failure to state a claim upon which relief can be granted;

(2) I decline to exercise supplemental jurisdiction over petitioner's state law claim;

(3) 28 U.S.C. § 1915(g) directs the court to enter a strike when an " action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because the state law claim does not fall under one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g);

(4) The unpaid balance of petitioner's filing fee is $124.16; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

(5) The clerk of court is directed to close the file.

Entered this 29th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge