

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

LLOYD T. SCHUENKE,

Petitioner,

v.

ORDER

00-C-668-C

WISCONSIN DEPARTMENT OF CORRECTIONS;
JON LITSCHER, Secretary of the Wisconsin
Department of Corrections; BONNIE UTECH,
Personnel Assistant of the Wisconsin Department
of Corrections; BUREAU OF HEALTH SERVICES;
GEORGE DALEY, Medical Director of the Wisconsin
Department of Corrections; SHARON ZUNKER,
Secretary of the Bureau of Health Services; SUSAN
KOON, Dodge Correctional Institution Health Services
Unit Manager; JAMES TRELEVEN, Dodge Correctional
Institution Laboratory Technician; JAMES WONG,
Dodge Correctional Institution Medical Doctor; JAMES
PARISH, Dodge Correctional Institution Medical Doctor;
JOSEPH PAVELESEK, Dodge Correctional Institution
Medical Doctor; MARY GORSKE, Dodge Correctional
Institution Registered Nurse; MICHAEL BECK, Dodge
Correctional Institution Offender Complaint Examiner;
and JOANNE BONES, Dodge Correctional Institution
Offender Complaint Examiner,

Respondents.

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Lloyd T. Schuenke 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 fees and costs of instituting this lawsuit.

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 court must dismiss the case if the 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. See 28 U.S.C. § 1915(e)(2). Petitioner contends that he received inadequate medical care in violation of the Eighth Amendment, that he was forced to give blood for medical tests in violation of his First Amendment right to freedom of religion and that he was retaliated against for filing a complaint about the blood tests. All claims will be dismissed for petitioner's failure to state a claim upon which relief may be granted.

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

ALLEGATIONS OF FACT

I. PARTIES

Petitioner Lloyd T. Schuenke is a resident of Wisconsin and is currently on parole from the Wisconsin Department of Corrections. Respondent Wisconsin Department of Corrections is a state agency responsible for the care, custody and discipline of offenders. Respondent Bureau of Health Services is responsible for providing medical services and treatment to offenders in the Wisconsin Department of Corrections. All other respondents are employees of the Wisconsin Department of Corrections: respondent Jon Litscher is Secretary of the department; respondent Bonnie Utech is a personnel assistant; respondent George Daley is Medical Director of the Bureau of Health Services and is responsible for supervising the operations of the health services units under Wisconsin Department of Corrections' control; respondent Sharon Zunker is Secretary of the Bureau of Health Services; and respondents Michael Beck and Joanne Bones are offender complaint examiners at Dodge Correctional Institution's Offender Complaint Examiner Office. The remaining respondents work at the health services unit at Dodge Correctional Institution. Respondent Susan Koon is the health services unit manager; respondent James Treleven is a laboratory technician; respondents James Wong, James Parish and Joseph Pavelesek are medical doctors; and respondent Mary Gorske is a registered nurse.

II. MEDICAL CARE

On August 4, 1999, petitioner arrived at Dodge Correctional Institution as a mandatory release parole revocation returnee. The same day, respondent James Treleven told petitioner to sign a document titled "Consent to Test for HIV Antibody and Disclosure" so that petitioner could have a blood test conducted for the human immunodeficiency virus. On August 5, 1999, respondent Treleven drew blood from petitioner for laboratory testing. Respondent Treleven took both actions at the instruction of respondents Bureau of Health Services, George Daley and Sharon Zunker and under the direct supervision of respondents Susan Koon and James Wong.

On August 20, 1999, respondent James Parish gave petitioner an initial intake physical examination and diagnosed petitioner as having scoliosis. Respondent Parish gave petitioner a lower bunk restriction. At the end of the physical examination, respondent Parish gave petitioner information on detecting testicular cancer.

On August 22, 1999, petitioner submitted to the Health Services Unit a health services request asking for a copy of his HIV, blood and urine test results. Petitioner also submitted a health services request asking that an x-ray of his back be done to determine how serious his scoliosis was. On August 23, 1999, petitioner was told that an x-ray of his back had been ordered in response to his request. On August 23, 1999, respondent Parish noted in petitioner's medical file, "Give slip from inmate asking for evaluation of scoliosis and physical

x-ray ordered as he did have right thoracic hump” and “X-ray thoracic spine for scoliosis.”

On August 22, 1999, petitioner filed an offender complaint against the Health Services Unit, stating

On August 5, 1999, under the guidance and instruction of a doctor, I was required to submit to a mandatory blood test which was conducted by a male registered nurse in order to have the blood screened for different things in violation of my right to freedom of religion guaranteed to me pursuant to the First Amendment of the United States Constitution, Title 42 U.S.C. 2000bb of the United States Code and Genesis 9:4, Genesis 9:5, Genesis 9:16, Leviticus 17:11, Leviticus 17:14, Mark 8:35, Mark 8:36, of the New World translation of the holy scriptures because as a Jehovah's Witness, I am instructed and taught that my blood is my soul and that I am not allowed to forfeit it unless I am forfeiting it in the name of Jehovah or back to Jehovah himself. Wherefore I am respectfully asking and requesting that this institution's medical unit policies and procedures for drawing blood be changed to respect a person's religious beliefs because there is absolutely no justifiable penological interest or reason for enforcing such a strict policy against a person.

On September 2, 1999, respondents Bones and Beck filed a recommendation with respect to the complaint, rejecting the complaint because it was not filed within fourteen days after the occurrence that gave rise to the complaint and because inmates are allowed to refuse blood draws and the lab technician did not remember anyone requesting to refuse a blood draw.

On August 24, 1999, petitioner submitted a health services request asking for information about “what I should know about scoliosis.” On August 25, 1999, petitioner received a response to his request, indicating that the library had excellent information on that medical concern.

On August 24, 1999, petitioner submitted a health services request asking “to be provided with a back brace to support my back seeings how I got scoliosis.” On August 25, 1999, petitioner was told that x-rays of his back had been ordered and that his need for a brace would be determined once the x-ray results were received.

On August 24, 1999, petitioner submitted a health services request asking to be provided a copy of the scheduled x-ray of his spine.

On August 25, 1999, petitioner filed a second offender complaint (D.C.I.-1999-55398) against the Health Services Unit stating in part,

. . . What is it does the health services unit like to deliberately, intentionally, knowingly, maliciously and sadistically play games with an inmates emotional, mental and physical well-being by playing games with an inmate’s serious medical needs specially when an inmate runs the risk of becoming permanently paralyzed.

Respondents Bones and Beck filed a recommendation in response to this complaint on September 2, 1999. The recommendation noted that copies of the results of his blood tests had been made and

Scoliosis is curvature of the spine which usually happens during the early teen years. Most cases are mild (as is the case with complainant) and require nothing more than remaining active to keep the back strong. A back brace is not effective in adults with scoliosis and scoliosis does not result in paralysis. Only severe cases of scoliosis need surgery and this is usually detected before age 20. Scoliosis is, in this case, a pre-existing condition that will not get worse after the teenage growing years are complete. The complainant was told to look this up in the library but obviously he has not done so. An appointment will be scheduled to

further explain scoliosis to him and he will again be encouraged to use the library as a resource. Based on the facts as present, I recommend that this complaint be dismissed.

On August 27, 1999, respondent Gorske noted in the physician's orders section of petitioner's medical file, "Schedule C NP Gorske to explain scoliosis."

On August 27, 1999, petitioner was given a copy of his H.I.V. test results, health study 24 results and laboratory procedures urinalysis test results from the health services unit.

On August 29, 1999, petitioner submitted a health services request asking to know the day for which his spinal x-rays had been scheduled. Petitioner was told that he could not be given the date for security reasons.

Respondent Gorske had petitioner sign a consent form authorizing the administration of the hepatitis B vaccination shot and gave petitioner some information about the hepatitis B vaccine.

On August 30, 1999, petitioner filed a third offender complaint against the Health Services Unit, stating in part,

I have not received a response to any of my requests as of yet. What have I done to deserve this kind of mistreatment by this health services unit? Why must I have all this emotional, mental and physical distress inflicted on me? It is to the point where I can't sleep soundly at night for the fear of hurting my spine more.

On August 31, 1999, respondent Gorske called petitioner to the health services unit in

response to the offender complaint petitioner filed on August 22. She gave petitioner some information about scoliosis and a sheet of back exercises for him to do. Respondent Gorske noted in the progress notes section of petitioner's medical file,

Seen in regards to I.C.I. No. 1. Informed admission blood draws may be refused, however he needs to tell person drawing his blood. (He did sign consent for H.I.V. test.) Given handout on scoliosis and sheet for back exercises. Handout explained. Told scoliosis starts in early teens is most often mild will not get worse or cause paralysis because he has stopped growing. Encouraged to use library for health questions in the future.

On September 3, 1999, petitioner filed a fourth offender complaint against the health services unit, demanding that an x-ray of his spine be taken and asking, "Why is it I am being denied adequate medical treatment that I am entitled to? Why is it that I have been straight lied to my face by health services unit staff?" Respondents Bones and Beck incorporated this complaint with the offender complaint petitioner filed on August 30, 1999, because it addressed many of the same issues. On September 4, 1999, respondents Daley and Zunker agreed with the offender complaint examiner's recommendation to dismiss the consolidated complaints.

On September 6, 1999, petitioner submitted a health services request stating,

On August 20, 1999, I was diagnosed with scoliosis by Doctor James Parish. Ever since then, I have been having sharp sticking pains which shoot across my lower back to the point where it stops my normal back movement temporarily because it hurts that much. That is exactly why I made a formal request for a back brace on August 24, 1999, to alleviate the strain on my lower back.

However, I was denied that request. At this time, I am respectfully requesting to be provided with a back brace to support my back.

The same day, petitioner submitted a health services request asking to be scheduled for x-rays of his spine.

On September 6, 1999, petitioner filed his fifth offender complaint against the Health Services Unit. Petitioner described the pain in his back and asked again for a back brace. Petitioner wrote, in part,

Seeings how this is my first time being diagnosed with this disease can you tell me exactly how a nurse can tell me first of all my spine is not growing anymore. Can you tell me exactly how a nurse can tell what stage my back is in without an x-ray, can you tell me exactly where a nurse gets off telling me that I can't have a back brace in order to alleviate the strain on my back that way I am not in so much pain. Can you or anyone for that matter assure me medically that by me not wearing a back brace I don't run the risk off my spinal cord of being broke or cut from all the bending and twisting my spinal column itself. I am requesting that an x-ray of my spine be taken and that I be given the actual x-ray itself or a copy of the x-ray for future medical reasons and that I be provided with a back brace to support my back and alleviate my back pain that I am experiencing. This is the proper form of medical treatment for scoliosis that I am entitled to from the Wisconsin Department of Corrections and its employees while in their custody. Why am I being provided with only a quarter of the treatment that I am entitled to? I am sick of being put under all this emotional, mental and physical distress over something that your health services unit diagnosed me with and has the ability to treat right within its health services unit itself.

On September 7, 1999, respondent James Parish called petitioner to the Health Services Unit to have two x-rays of petitioner's spine taken. The two x-rays were developed by Doctor Douglas Armato, who prepared a radiology report stating,

Frontal and lateral views of the thoracic lumbar spine are dated 9/7/99, vertebral body heights and disk spaces are well maintained. No abnormal curvatures are evident, but there is a grade (1) spondyloisthesis of L5 on S1 with suggestion of bilateral pars defects. Only the lower five (5) thoracic levels are included on the exam.

On September 13, 1999, petitioner filed his sixth offender complaint against the health services unit. In the complaint, petitioner noted that he had not received a response to his requests asking for a back brace and for the results of his x-rays.

This conduct leads me to believe two (2) things. One (1) someone is trying to figure out how to change the paperwork, two (2) the x-rays show something that the health services unit does not know how I will react to. The health services unit staff's conduct has scared me to the point where I will not accept or receive any further treatment from them.

This complaint was combined with an earlier complaint petitioner submitted on the same issue.

On September 14, 1999, respondent Gorske wrote a note in the physician's orders section of petitioner's medical records stating "Have M.D. explain results of back x-rays." On September 16, 1999, respondent Joseph Pavelessek told petitioner that the x-rays of petitioner's spine showed that petitioner had grade I spondylolisthesis of L5 on S1 as well as scoliosis. Respondent Pavelessek wrote in the progress notes section of petitioner's medical records,

Has had back pain for 3+ years comes and goes. Sharp shooting pain like someone sticking him with a needle just at the thoracic lumbar area of body and pain hurts half way around the side. . . . hurts a little when he sits, but when he lies on his back it tightens up and he has to turn on his side. Was told he might need a back brace. . . . Not to do any strenuous lifting or work. Pt. very concerned about our x-ray report. Will get ortho opinion.

Respondent Pavelesek submitted a request for authorization of a class (3) surgery to respondent Daley for Daley's medical opinion, stating,

Lower thoracic and lumbar body pain during physical examination was noted that pt. might have scoliosis. X-ray report = grade (1) spondyloisthesis of L5 + S1 but no abnormal (curvature) has suggestion of bilateral pars defect. Grade (1) spondylolisthesis of L5 S1 with possible bilateral pars defects. Request orthopedic consult possibly on site with Dr. to get his opinion on and to discuss findings with this pt. The patient is very upset that this was just found.

On October 4, 1999, petitioner received a copy of a memorandum stating, "*Class (3) B - No procedure should be scheduled at this time. Submit a report to us in ____ if there is any change in status. If more information will change this status, resubmit the request and the information. Spondylolisthesis of little difficulty and rarely anything done or RXed."

On September 22, 1999, respondents Beck and Bones filed a recommendation responding to the complaints filed by petitioner on September 3, 1999, September 6, 1999 and September 13, 1999. Respondents noted that x-ray film is not an allowable property item but that a lawyer or doctor could ask to borrow the film when it was returned to the prison after evaluation by an expert. Respondents noted further,

RN Gorske stated it is a medical fact that the spine stops growing between the ages of 16-18 years old. The inmate is 27 years old. RN Gorske state HSU can medically assume the inmate does not run any risk of his spinal cord being broken or cut and that he does not need a back brace. In fact, she stated the only treatment the inmate needs for his scoliosis is back exercises. The inmate has been given a handout with these exercises and was encouraged to do them. Based on the facts as presented, I recommend this complaint be dismissed. I

found no evidence to indicate the inmate is not getting adequate medical treatment. In fact, this RN has spent a considerable amount of time educating the inmate regarding his condition and how to improve it.

On September 23, 1999, petitioner was transferred to Oshkosh Correctional Institution.

On February 5, 2000, petitioner filed a notice of claim, notice of injury and notice of claim for damages with the Wisconsin attorney general's office, informing it of his intent to pursue legal action in regard to this matter.

DISCUSSION

I understand petitioner to allege that he received inadequate medical treatment for his scoliosis and spondylolisthesis in violation of the Eighth Amendment. Petitioner also contends that respondents refused to provide petitioner with medical treatment in retaliation for his filing a complaint against the health services unit after it required petitioner to submit to a blood test in violation of his right to freedom of religion. Petitioner also contends that respondents were negligent in failing to provide him with adequate medical treatment and that respondents violated various Wisconsin statutes.

I. 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 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).

Petitioner alleges that he has scoliosis and grade I spondylolisthesis. ("Scoliosis is a complicated deformity of the spine characterized by lateral curvature and vertebral rotation." Robert K. Ausman and Dean E. Snyder, 3 Medical Library Lawyers Edition § 4:37 (1989). "Spondylolisthesis is a condition in which a congenital defect in the neural arch of the vertebra causes one vertebra to slip forward upon another, most commonly in the lower lumbar vertebrae." Id. at § 4:35.) Even assuming that these conditions are serious medical needs, petitioner has failed to allege any facts to support an inference that any of the respondents recklessly disregarded such conditions, resulting in needless pain and suffering. That petitioner may have suffered emotional distress because he thought these medical conditions were more serious than they were does not state a claim under the Eighth Amendment. Petitioner's requests for information were responded to promptly. 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 request for leave to proceed in forma pauperis on his Eighth Amendment claim will be denied for his failure to state a claim upon which relief may be granted.

II. RETALIATION

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. See id. To state a claim in the absence of direct evidence of retaliation, the prisoner must allege a chronology of events that supports drawing an inference that the official acted in retaliation, see Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994); the allegations must show that absent a retaliatory motive, the prison official would have acted differently. See Babcock, 102 F.3d at 275. Petitioner alleges that respondents denied him adequate medical treatment because he filed a grievance in which he claimed that the health services unit

drew blood from him in violation of his First Amendment right to free exercise of religion. Because I have concluded that respondents' actions toward petitioner with respect to his medical needs were appropriate and responsive to petitioner's requests, I will not infer that those actions were taken to retaliate against petitioner. Nothing in petitioner's allegations supports that respondents' actions were taken for any reason other than to provide standard medical care. Petitioner will be denied leave to proceed in forma pauperis on his claim of retaliation because he has failed to state a claim upon which relief may be granted.

III. FREEDOM OF RELIGION

I understand petitioner to contend that respondents violated his First Amendment rights by taking his blood for medical tests without his permission. Petitioner does not allege that he indicated to anyone in the health services unit that he did not want his blood to be taken or that such drawing of blood violated his religious beliefs. The fact that petitioner was asked to sign a consent form should have indicated to petitioner that he was free to withhold consent. Petitioner has failed to state a claim upon which relief may be granted.

IV. STATE LAW CLAIMS

Because I will deny petitioner leave to proceed in forma pauperis on any federal claims, I will decline to exercise supplemental jurisdiction over any state law claims.

OPINION

IT IS ORDERED that petitioner Lloyd T. Schuenke's request for leave to proceed in forma pauperis on his claims under the First and Eighth Amendments is DENIED and this action is DISMISSED for petitioner's failure to state a claim upon which relief may be granted.

Entered this 4th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge