

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

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VICTOR KENNETH JOHNSON,

Petitioner,

v.

ORDER

03-C-213-C

EMPLOYEES WAUPUN CORRECTIONAL  
INSTITUTION; G.M. McCAUGHTRY (Warden);  
PAULINO BELGADO (M.D.); B. SCHRUBBE (R.N.);  
M. GORSKI (R.N.); VARIOUS CORR. OFFICERS of  
W.C.I.; and J. MUENCHOW (Grievance Litigator);

Respondents.  
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Petitioner Victor Kenneth Johnson, a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, has submitted a proposed complaint for injunctive and monetary relief pursuant to 42 U.S.C. § 1983. He requests leave to proceed in forma pauperis. From petitioner's trust fund account statement, it appears that petitioner presently has no means with which to pay an initial partial payment of the \$150 fee for filing his complaint. However, petitioner should be aware that he is obligated to pay the \$150 filing fee, even if this court determines that he will not be permitted to proceed with his complaint in forma pauperis and even if he does not presently have funds with which to pay the fee.

28 U.S.C. § 1915(b)(1). His account will be monitored and the fee must be taken in monthly installments when the funds exist.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages.

Petitioner's complaint is short. It is set out below verbatim.

#### ALLEGATIONS OF FACT

To extract funds from defendants to provide an improved quality of life for plaintiff and heirs. Poor care and mal-practice will and has shortened my life span and family time together. Compensation might provide a cushion for our grief. More important would be showing [how] high-placed professional[s] must do their jobs to the max & beyond and provide humane and top quality care and service with feelings.

## OPINION

I understand petitioner to be alleging that respondents have not performed their jobs so as to protect him from “poor care” and medical malpractice.

Except in unusual circumstances not present here, federal courts have jurisdiction to hear a prisoner’s complaint that state officials have denied him proper medical care only when the facts alleged in the complaint state a claim under the Eighth Amendment. Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care when they are deliberately indifferent to a prisoner’s serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

Petitioner has not alleged any facts to suggest that he had a serious medical need, such as a medical condition generally considered as life-threatening or as carrying risks of permanent, serious impairment if left untreated, or that he was suffering such significant pain that denial of assistance would be “uncivilized.” Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996); but see Snipes v. Detella, 95 F.3d 586, 592 (7th Cir. 1996)(Eighth Amendment does not require prison doctors to keep an inmate pain-free in the aftermath of proper medical treatment). Furthermore, petitioner does not allege facts to suggest that the named respondents knew that he had a serious medical need as defined above and that they disregarded “an excessive risk that a lack of treatment posed” to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001).

Petitioner alleges that respondents are guilty of poor care and malpractice. Claims of medical malpractice are claims of a violation of state law. Inadvertent error, negligence, ordinary malpractice, or even gross negligence does not constitute deliberate indifference, and thus does not give rise to an Eighth Amendment claim. Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515 (7th Cir. 2002); see also Snipes, 95 F.3d at 590-91. This court has jurisdiction to decide state law claims only under two circumstances, neither of which exists here. First, a federal court can hear state law claims where the plaintiff and defendants live in different states and the amount of alleged damages exceeds \$75,000. This is called diversity jurisdiction. In addition, a federal court may agree to hear state law claims that arise out of the same set of facts as a viable federal law claim. This is called supplemental jurisdiction. Because plaintiff has not alleged facts sufficient to make out a claim under federal law, I cannot take jurisdiction over his state law claims.

In summary, because petitioner has not alleged any facts in his complaint that could be construed liberally to make out a claim under the Eighth Amendment, and because this court does not have jurisdiction to hear his claims under state law, I must deny his request for leave to proceed in forma pauperis and dismiss this case for failure to state a claim upon which relief may be granted in federal court.

ORDER

IT IS ORDERED that:

1. Petitioner Victor Johnson's request for leave to proceed in forma pauperis on his claim that respondents provided him with poor care and committed medical malpractice is DENIED and this case is DISMISSED with prejudice.

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. 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 petitioner's state law claim is part of the action and the court did not dismiss that claim for one of the reasons enumerated in § 1915(g), a strike will not be recorded against petitioner under § 1915(g).

4. The clerk of court is directed to close the file.

Entered this 5th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge