

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

LEONARD A. CROSS,

Petitioner,

v.

STATE OF WISCONSIN;
DR. JAMES HAMMON, D.D.S.;
THOMAS KARLEN, Warden, Jackson
Correctional Institution; and DENTAL
STAFF at Jackson — unknown at this
time,

Respondents.

ORDER

03-C-142-C

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Jackson Correctional Institution in Black River Falls, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

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. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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's allegations relate to his dental care needs. He will be denied leave to proceed against respondent State of Wisconsin because the state is immune from suit and against respondent Hammon, because at best petitioner's allegations suggest Hammon was guilty of malpractice when he treated plaintiff. Although malpractice is actionable under state law, it does not rise to the level of an Eighth Amendment violation. However, petitioner will be granted leave to proceed in forma pauperis against respondents Karlen and

the Doe dental staff respondents at Jackson Correctional Institution on his claim that they were deliberately indifferent to his serious dental needs. Petitioner's motion for appointment of counsel will be denied without prejudice to his refiling it at a later date.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Leonard A. Cross is a Wisconsin inmate presently confined at the Jackson Correctional Institution in Black River Falls, Wisconsin. Petitioner was previously confined at the Dodge Correctional Institution in Waupun, Wisconsin. Respondent Dr. James Hammon is a dentist at the Dodge Correctional Institution. Respondent Thomas Karlen is the warden at the Jackson Correctional Institution. The Doe respondents are unidentified "dental staff at Jackson."

On August 15, 2002, petitioner was treated by respondent Hammon at the Dodge prison. On that day, respondent Hammon was pulling several of petitioner's teeth. Towards the end of the procedure, petitioner felt a strong jab to the back of his throat. Petitioner could not communicate effectively because he had been administered Novacaine, so he pointed to the back of his throat. Respondent Hammon looked into the back of petitioner's mouth and said in a sarcastic tone, "Ya, you might need some stitches in that." Respondent Hammon proceeded to stitch the wound, but petitioner stopped him because he could feel

the stitching needle. Respondent Hammon administered more Novacaine, stitched the wound and resumed pulling petitioner's teeth. Respondent Hammon was working too fast and it seemed to petitioner that Hammon did not care about the damage he did to petitioner's throat because petitioner is only a prison inmate. When respondent Hammon pulled petitioner's teeth, he took big chunks of petitioner's gums as well. Respondent Hammon was arrogant and unprofessional. Above the area that was stitched, petitioner has a hole about 1/4 of an inch by 1/8 of an inch across and 1/16 of an inch deep that respondent Hammon did not stitch. The hole collects food and must be cleaned out frequently, causing petitioner to gag violently on his toothbrush and occasionally to vomit. Following the procedure, petitioner could not eat solid food for two weeks and was in pain for nearly a month. The pain medication respondent Hammon prescribed was weak. Respondent Hammon also pulled a healthy tooth. Upon extraction, this tooth made a loud popping sound and petitioner asked to see it. There was not a mark on the tooth.

Since September 2, 2002, petitioner has been housed at the Jackson Correctional Institution. He has made the dental staff there aware of his needs and the reason why he must be seen more quickly than normal. Since arriving at Jackson, petitioner has needed three teeth filled, at least one of which must be pulled because it went untreated. Petitioner needs an upper and lower plate because of the number of teeth he had pulled, but the plates have been delayed even though petitioner was told at the Dodge prison that all follow-up

work he needed would be completed at Jackson. This causes petitioner difficulty in chewing food. During the six months petitioner has been at Jackson, he has seen a dentist only once for the filling of a tooth that was not a priority. Each of petitioner's other appointments has been cancelled. There has been no dentist at Jackson since October 20, 2002. Respondent Karlen told petitioner that a dentist was unavailable and that he should send another request. Petitioner has complained of intolerable pain and sent request after request to the dental staff at Jackson for dental work but has not received any response. The only way to get pain relief is to send a request to the dentist and pay \$7.50 for \$2 worth of Ibuprofen.

In March 2003, petitioner was brought to the dentist for an unscheduled appointment. The dentist corrected a major dental problem.

OPINION

As an initial matter, I note that petitioner has named the state of Wisconsin as a respondent. The Eleventh Amendment bars suits against the states in federal court for money damages. See Wynn v. Southward, 251 F.3d 588, 592 (7th Cir. 2001). Therefore, respondent state of Wisconsin must be dismissed.

Petitioner alleges that the dental treatment he received at both the Dodge Correctional Institution and the Jackson Correctional Institution violated the Eighth Amendment. 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 an Eighth Amendment claim of cruel and unusual punishment, a prisoner must show that (1) he had a serious medical need and (2) the defendants were deliberately indifferent to it. Garvin v. Armstrong, 236 F.3d 896, 898 (7th Cir.2001); see also Estelle, 429 U.S. at 106 ("a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs"). The Court of Appeals for the Seventh Circuit has defined "serious medical needs" as encompassing 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. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Deliberate indifference entails more than "mere negligence," Farmer v. Brennan, 511 U.S. 825, 836 (1994), but requires the prisoner to show that the prison official was aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed to the prisoner's health or safety. Id. at 837. According to the Court of Appeals for the Seventh Circuit, "dental care is one of the most important medical needs of inmates." Wynn, 251 F.3d at 593 (citation omitted) (inmate stated claim when deprived of dentures and was unable to chew food and suffered bleeding, headaches, humiliation and disfigurement).

Petitioner alleges that in the course of pulling several of his teeth, respondent Hammon lacerated his throat, improperly stitched the laceration, damaged his gums and removed an otherwise healthy tooth, causing petitioner pain and permanent difficulty cleaning the area of the laceration. These allegations are sufficient to demonstrate that petitioner's medical need was serious. Id. However, petitioner's allegations are insufficient to suggest that respondent Hammon acted with deliberate indifference. 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 and medical 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. Petitioner does not allege that respondent Hammon intentionally mistreated him. Rather, he suggests that respondent Hammon was "arrogant," "unprofessional," "didn't care about what he was doing" and "was working to [sic] fast." These allegations suggest professional negligence, not deliberate indifference. Although petitioner may well have a viable claim for medical malpractice, the Eighth Amendment is not the appropriate vehicle for bringing such a claim. Snipes, 95 F.3d at 590; Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) ("[T]he courts have labored mightily to prevent the transformation of the Eighth Amendment's cruel and unusual punishments

clause into a medical malpractice statute for prisoners”). Accordingly, petitioner will be denied leave to proceed on his Eighth Amendment claim against respondent Hammon. Because petitioner cannot proceed under the Eighth Amendment, I will also decline to exercise supplemental jurisdiction over his malpractice claim, which arises under state law, if at all. Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or decline jurisdiction over state law claims).

Petitioner alleges that not long after he was treated by respondent Hammon, he was transferred to the Jackson Correctional Institution. Petitioner alleges that from September 2002 to March 2003, he was seen only once by a dentist who did nothing more than fill a tooth for him, despite petitioner’s variety of dental care needs. Petitioner alleges that he needs three teeth filled, one of which must be pulled because of the delay in treatment, and that as a result of delays he has experienced tooth aches and serious pain. I also understand petitioner to allege that he needs dentures because of the number of teeth he had pulled before arriving at the Jackson prison, but that he has yet to receive them, making it difficult for him to chew food. Petitioner also alleges that from October 20, 2002 until he filed his complaint in March 2003, the Jackson Correctional Institution was without a dentist. At the bottom of his complaint, petitioner notes that “[t]oday, I was brought to the dentist on a unscheduled appointment” and that “the dentist filled a major dental problem, hopefully for good,” but he does not suggest which of his dental needs was addressed.

Petitioner characterizes this group of allegations as an “action for Administrative Negligence and Mal-Practice.” As explained above, claims for negligence and malpractice against state officials are not constitutional or federal law claims that may be brought pursuant to 42 U.S.C. § 1983. Rather, they typically must be pursued in state court. However, petitioner is not a lawyer and the label he applies to his claims is not conclusive. Indeed, as opposed to petitioner’s claim regarding the substandard treatment he received from respondent Hammon, his allegations regarding the lengthy delays in treatment he has experienced at the Jackson Correctional Institution is a natural fit under the Eighth Amendment. “This Court’s . . . decisions, as well as those of the other circuit courts, have repeatedly recognized that delays in treating painful medical conditions that are not life-threatening can support Eighth Amendment claims.” Gutierrez, 111 F.3d at 1371. Petitioner alleges that he informed respondent Karlen that he was being denied necessary dental care and that he “sent request after request to the dental staff” at the Jackson prison but received no response. At this stage of the proceedings, petitioner’s allegations are sufficient to state a claim that both respondent Karlen and the Doe dental staff respondent or respondents responsible for dealing with inmate requests for dental treatment were deliberately indifferent to his serious dental needs. As warden of the Jackson Correctional Institution, respondent Karlen should be in a position to provide petitioner with the identity of the Doe respondents during the discovery process.

Finally, petitioner has requested that the court appoint counsel to represent him. Before the court can appoint counsel in a civil action such as this, it must find first that the petitioner made a reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). In this court, a petitioner must list the names and addresses of at least three lawyers who declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Petitioner does not suggest that he has made an effort to find a lawyer on his own and that his efforts have failed. Second, the court must consider whether the petitioner is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is too new to allow me to assess petitioner's abilities. Therefore, petitioner's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

ORDER

IT IS ORDERED that

1. Petitioner Leonard A. Cross's request for leave to proceed in forma pauperis against respondent State of Wisconsin is DENIED as legally frivolous because the state is

immune from suit;

2. Petitioner's request for leave to proceed in forma pauperis against respondent Dr. James Hammon, D.D.S., is DENIED for petitioner's failure to state a claim upon which relief may be granted;

3. Petitioner's request for leave to proceed in forma pauperis on his Eighth Amendment claim against respondent Thomas Karlen and the Doe dental staff respondent or respondents at the Jackson Correctional Institution responsible for dealing with inmate requests for dental treatment is GRANTED.

4. Petitioner's motion for appointment of counsel is DENIED without prejudice to his raising it again at a later date;

5. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' attorney;

6. The unpaid balance of petitioner's filing fee is \$148.05; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

Entered this 28th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge