

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

FRANCISCO M. RUIZ,

Petitioner,

v.

GLEN HEINZL, M.D.; CANDACE WARNER, RN, BSN, HSM;
WARDEN TIMOTHY LUNDQUIST; SECRETARY MATTHEW FRANK,
RICK RAEMISCH, SANDRA HAUTAMAKI, SHARON ZUNKER,
MILDRED PARISE; New Lisbon Correctional Institution Medical Personnel;
Dodge Medical Personnel,¹

Respondents.

This is a proposed civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, contends that respondents were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. Petitioner further contends that the Department of Corrections' medication policy is in

¹ In his complaint, petitioner did not name individually respondents Raemisch, Hautamaki, Zunker and Parise. Instead, he named the "N.L.C.I. complaint examiners" generally. Documents attached to petitioner's complaint show that his grievance was reviewed by these four individuals. I have amended the caption accordingly.

conflict with the Eighth Amendment because the policy denies treatment to inmates who have been diagnosed with genotype 1 hepatitis C and are within 18 months of their mandatory release date.

Petitioner 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. 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). 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).

I draw the following facts from petitioner's complaint and the documents attached to it.

ALLEGATIONS OF FACT

A. Parties

Petitioner Francisco M. Ruiz is an inmate at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Glen Heinzl is a doctor at the New Lisbon Correctional Institution. Respondent Candace Warner is a nurse and health services manager at the New Lisbon Correctional Institution. Respondent Timothy Lundquist is Warden of the New Lisbon Correctional Institution. Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections.

B. Denial of Hepatitis C Treatment

_____Petitioner was diagnosed with genotype 1a hepatitis C on January 23, 2006. At that time, he was housed at the Dodge Correctional Institution. On March 29, 2006 he had an ALT liver test that showed results over 75. Department of Corrections protocol calls for a second ALT test at least four months later, with results above 75, before beginning further testing regarding hepatitis C treatment. Petitioner's second ALT liver test should occur

sometime in October 2006.

On May 9, 2006 petitioner was transferred to the New Lisbon Correctional Institution. Petitioner is under the medical care of respondent Heinzl at the New Lisbon Correctional Institution. Beginning in mid-June 2006, petitioner began requesting treatment for his hepatitis C. Respondent Heinzl refused to treat petitioner, noting that "DOC HCV treatment policy is that patients must have 18 months length of stay to be treated for genotype 1a. You will be released in April 2007. You do not qualify for treatment here based on your length of stay." Petitioner filed a complaint form with respondent Warner. Warner rejected petitioner's complaint, citing the DOC policy requirement that inmates must have at least 18 months left before release in order to begin treatment. Petitioner filed another complaint, NLCI-2006-17615, which was recommended for dismissal by inmate complaint examiner Mildred Parise after she contacted respondent Warner. In her summary of facts, Parise noted that petitioner would "not be incarcerated for the length of time the required treatment would entail." In addition, Parise stated that she did not have the proper education or experience to question Heinzl's or Warner's determinations regarding petitioner's medical needs. Sharon Zunker reviewed Parise's recommendation and dismissed petitioner's complaint on July 19, 2006. Petitioner submitted an appeal, which was recommended for dismissal by Corrections Complaint Examiner Sandra Hautamaki on July 31, 2006. Hautamaki's recommendation was accepted by Rick Raemisch on August 1,

2006.

DISCUSSION

I understand petitioner to allege that respondents are violating his Eighth Amendment rights by being deliberately indifferent to his need for treatment of his hepatitis C. Deliberate indifference to prisoners' serious medical needs is forbidden by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). To state an Eighth Amendment claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. In other words, petitioner must allege facts from which it can be inferred that he has a serious medical need (objective component) and that respondents are being deliberately indifferent to this need (subjective component). Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

"Serious medical needs" encompass (1) conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and (3) conditions that have been "diagnosed by a physician as mandating treatment." Gutierrez, 111 F.3d at 1371-73.

To allege deliberate indifference, petitioner's allegations must suggest that respondents are "subjectively aware of the prisoner's serious medical needs and [have]

disregarded an excessive risk that a lack of treatment pose[s]" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). A negligent or inadvertent failure to provide adequate medical care does not amount to deliberate indifference because such a failure is not an "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 105-06. However, a prison official need not intend or hope for the harm that the inmate may be suffering in order to be held liable under the Eighth Amendment. Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). Deliberate indifference in the denial or delay of medical care can be shown by a respondent's actual intent or reckless disregard. Reckless disregard is highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. See, e.g., Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

For example, if the denial of medical treatment is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition," Snipes, 95 F. 3d at 592, the conduct gives rise to a claim of deliberate indifference.

At this stage of the proceedings, I will assume that hepatitis C constitutes a serious medical need. Further, petitioner has alleged that he is being denied all treatment for this disease, for the sole reason that his release date is less than eighteen months away. It is possible that respondents denied the treatment because it requires 18 months of treatment and close monitoring to be effective. At this stage of the proceeding, however, petitioner has said enough to state a claim under the Eighth Amendment.

The remaining question relates to who the proper parties are. In a claim under 42 U.S.C. § 1983, the petitioner must allege facts from which an inference may be drawn that each respondent was “personally involved” in the constitutional violation, meaning that he or she either directly participated in the violation or knew about the conduct and facilitated it, approved it, condoned it or turned a blind eye for fear of what he or she might see. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). Petitioner alleges that respondents Heinzl and Warner are the doctors who are denying him treatment; he alleges that respondents Lundquist and Frank are responsible for the policy that respondents Heinzl and Warner are implementing. These allegations are sufficient to satisfy the personal involvement requirement.

Also, petitioner has named the officials who rejected his prison grievances in blind allegiance to the policy: respondents Raemisch, Hautamaki, Zunker and Parise. The Court of Appeals for the Seventh Circuit has held that a prison official may be held liable for a constitutional violation if he or she knows about it and has the ability to intervene, but fails to act. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). However, this rule “is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees.” Windle v. City of Marion, Ind., 321 F.3d 658, 663 (7th Cir. 2003). The court of appeals has made it clear that in order to succeed on a failure to intervene theory, a complainant must prove that the government employee failed to

intervene with deliberate or reckless disregard for the complainant's constitutional right. Fillmore, 358 F.3d at 505-06. At this stage of the proceedings, however, I will assume that complaint examiners have authority to find in favor of a prisoner on the ground that they believe a regulation or practice is unconstitutional. This is sufficient to satisfy the personal involvement requirement as to the respondents who reviewed petitioner's inmate complaint and denied him relief.

Finally, petitioner has named "New Lisbon Correctional Institution Medical Personnel" and "Dodge Medical Personnel." However, petitioner does not allege any facts that indicate that medical staff other than respondents Heinzl and Warner are responsible for denying him treatment. Accordingly, petitioner's claims against respondents N.L.C.I. Medical Personnel and Dodge Medical Personnel will be dismissed.

ORDER

IT IS ORDERED that

1. Petitioner Francisco M. Ruiz is GRANTED leave to proceed in forma pauperis on his Eighth Amendment claim that respondents Glen Heinzl, Candace Warner, Timothy Lundquist, Rick Raemish, Sandra Hautamaki, Sharon Zunker, Mildred Parise and Matthew Frank are denying him treatment for his hepatitis C.

2. Petitioner's claims against New Lisbon Correctional Institution medical personnel

and Dodge medical personnel are DISMISSED for petitioner's failure to allege their personal involvement in any unconstitutional act.

3. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondents or to respondents' attorney.

4. Petitioner should keep 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.

5. The unpaid balance of petitioner's filing fee is \$343.55; petitioner is obligated to pay this amount in monthly installments, as described in 28 U.S.C. § 1915(b)(2).

6. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on the state respondents.

Entered this 6th day of October, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge