

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

COREY PALMS,

Petitioner,

v.

ORDER

07-C-44-C

DR. QUISLING, Dentist; VICKI
KAMRATH, Dentist Assistant;
SANDRA SITZMAN, Health
Service Manager or Active Supervisor;
and JOHN DOES, Nurses-prison
official, individually and in their
official capacities,

Respondents.

This is a proposed civil action for injunctive, declaratory and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Corey Palms is presently confined at the Columbia Correctional Institution in Portage, Wisconsin. He contends that respondents Dr. Quisling, Vicki Kamrath, Sandra Sitzman and John Does violated his Eighth Amendment protection against cruel and unusual punishment when they were deliberately indifferent to his serious medical need by failing to provide him with pain medication for eight hours after respondent Quisling removed one of petitioner's wisdom teeth.

Now before the court is petitioner's request 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 fee for filing 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).

In his complaint, petitioner alleges the following facts.

FACTS

A. Parties

Petitioner Corey Palms is a prisoner. At all times relevant to this complaint he was housed at the Columbia Correctional Institution.

Respondent Dr. Quisling is a dentist who removed one of petitioner's wisdom teeth at the Columbia Correctional Institution. Respondent Vicki Klamath is a dental assistant who assisted respondent Quisling. Respondent Sandra Sitzman is the health services manager at the Columbia Correctional Institution. Respondents John Does are nurses and prison officials.

B. Dental Care and Provision of Pain Medication

On September 9, 2005, while he was at the Dodge Correctional Institution, petitioner was examined by a dentist who determined that he had a cavity in one of his wisdom teeth and that the tooth should be pulled. Dodge Correctional Institution staff told petitioner that the tooth would be pulled when he was at his next institution. Petitioner arrived at the Columbia Correctional Institution on December 20, 2005. In January, 2006 petitioner filed an inmate complaint requesting dental care at the Columbia Correctional Institution and was informed that there was no dentist at the institution and that he would be able to see a dentist when they hired one.

At approximately 8:00 a.m. on March 17, 2006, a correctional officer asked petitioner

whether he wanted to see a dentist. Petitioner was taken to the health services unit, where respondent Quisling examined petitioner's teeth, noted the cavity in one of his wisdom teeth and asked petitioner whether he wanted the tooth pulled that day. Petitioner indicated that he did. Respondent Quisling, aided by respondent Kamrath, pulled the tooth. When the procedure was finished, respondent Kamrath packed cotton in the back of petitioner's mouth and provided him with a "direction sheet" regarding proper care of the area. Petitioner asked respondents Quisling and Kamrath for pain medication. They told him that it would be delivered to his housing unit.

When petitioner returned to his housing unit at approximately 9:30 a.m. he asked his unit officer to let him know when his pain medication arrived, because he needed it to manage his pain. Correctional officers check prisoners every hour.

At 10:30 a.m., officers began delivering lunch trays. When the officers arrived at petitioner's cell, he asked whether his medication had arrived. The officer said that it had not arrived and petitioner asked whether they would call about it because he needed it for his excruciating pain. When petitioner indicated that he needed liquid food after having his tooth removed, the officer said that there were no directions regarding special food and gave him a regular lunch tray. When petitioner asked how he could eat solid food when his mouth hurt, could not be opened fully and was bleeding, the officer suggested that petitioner eat slowly, using the other side of his mouth. Petitioner began to get a migraine headache

and regurgitated the small amount of food he was able to eat.

At approximately 10:50 a.m., the officer stopped by petitioner's cell again and told him that he had called about the pain medication and that it would be delivered when the officers collected his food tray. When the officer passed out medication to other inmates at 11:00 a.m., petitioner was still not given any pain medication. Petitioner continued to experience severe pain. At noon, the officer told petitioner that the medication was on its way, and that he should "hold on." However, when the officer checked on plaintiff again at 1:00 p.m., he indicated that the medication had still not arrived. Petitioner asked to see the officer's supervisor, and the officer indicated that he would let a supervisor know about petitioner's condition if one happened to stop by the housing unit, but that he would not go out of his way to contact a supervisor on petitioner's behalf. At 1:30 p.m., petitioner again asked the officer to check on the whereabouts of his pain medication. The officer agreed to check, but left the unit when his shift changed at 2:00 p.m. without contacting petitioner again.

The officer who checked on petitioner at 2:00 p.m. told petitioner that the other officer had called the health services unit to check on petitioner's medication. This officer indicated that he "kn[ew] [petitioner's] situation." At 3:00 p.m., the officer told petitioner that he didn't know why it was taking so long for the medication to arrive and that he would call respondent Sitzman. When officers passed out dinner trays at 3:25 p.m., petitioner was

again given a regular tray and told that there were no special orders regarding his meals. Petitioner was not able to eat.

When the officer collected petitioner's food tray at 3:45 p.m., he indicated that he had spoken with "the supervisor" and that "she is taking care of it." (It is not clear whether the "supervisor" the officer mentioned was respondent Sitzman.) At 4:00 p.m., petitioner asked the officer if he could have some aspirin for his pain, and the officer told him that he couldn't because petitioner had to order aspirin from the canteen. Petitioner was in such excruciating pain that he planned to kill himself. Petitioner covered the window of his cell with paper; at 4:45 p.m. the officer told him to remove the paper. Petitioner told him that he wanted to talk to a supervisor, or "they are going to have problems." The officer told petitioner that he should not try to kill himself and that he would talk to respondent Sitzman again, but that petitioner had to remove the paper from his window. The officer told petitioner that everyone was aware of his medical condition, and that he would get the pain medication as soon as possible. The officer returned at 5:45 p.m. and gave petitioner two tablets of pain medication.

DISCUSSION

I understand petitioner to allege that respondents violated his Eighth Amendment rights by being deliberately indifferent to his need for pain medication following the removal

of one of his wisdom teeth. The Eighth Amendment protects prison inmates from cruel and unusual punishment and has been interpreted to require the government to provide for inmates' basic human needs such as food, clothing, shelter and medical care. Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996). With respect to medical care, the Supreme Court has held that "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" to state an Eighth Amendment claim. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

This standard contains objective and subjective components. First, an inmate's medical need must be objectively serious. A condition meets this standard if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005). In addition, the Court of Appeals for the Seventh Circuit has held that the phrase "serious medical needs" encompasses 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).

The subjective element of a denial of medical care claim requires that the prison official act with a sufficiently culpable state of mind. Id. at 1369. This state of mind, known as deliberate indifference, requires at a minimum that a prison official be aware of

and disregard a substantial risk to the inmate's health. Greeno, 414 F.3d at 653. In other words, the official "must 'both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists' and 'must also draw the inference.'" Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). However, "a prisoner claiming deliberate indifference need not prove that the prison officials intended, hoped for, or desired the harm that transpired." Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). On the other hand, inadvertent error, negligence, gross negligence and ordinary malpractice do not constitute deliberate indifference. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996).

At this stage, I will assume that the pain that petitioner suffered as a result of the delay in the provision of medication was sufficiently severe to state an Eighth Amendment claim, because it caused him needless pain and suffering. Gutierrez, 111 F.3d at 1371. However, I must still consider whether any of the respondents exhibited deliberate indifference to petitioner's pain.

1. Respondents Quisling and Klamath

_____ In order to state a claim against respondents Quisling and Klamath, petitioner was required to allege facts from which it may be inferred that they were aware that petitioner did not have pain medication for hours after they removed his wisdom tooth and

experienced severe pain as a result. From the facts alleged by petitioner, it is not possible to draw such an inference. Instead, it appears that respondents Quisling and Klamath ceased to be involved after they removed petitioner's wisdom tooth. When petitioner asked respondent Klamath whether he would be given pain medication, she told him that it would be delivered to him in his cell. Whether she should have taken additional steps to insure that the medication was actually delivered is beside the point. Even if she was negligent in not checking on the medication, negligence does not rise to the level of an Eighth Amendment violation. Estelle, 429 U.S. at 105-06.

2. Respondent Sitzman

_____Petitioner contends that respondent Sitzman was contacted by correctional officers at least twice regarding his requests for pain medication and that "everyone knew" about his medical condition. Although petitioner did not interact with respondent Sitzman directly, he has alleged facts from which it is possible to infer that she knew that he did not have any pain medication (particularly after she was contacted by the correctional officer at 1:30 p.m.), was in severe pain and had requested repeatedly that medication be sent to him immediately. It is also possible to infer that she could have expedited the delivery of his medication and did not do so. At this early stage in the proceedings, petitioner has done enough to state an Eighth Amendment claim against respondent Sitzman.

Petitioner should be aware that he will not be granted leave to proceed against respondent Sitzman in her supervisory capacity. Liability under § 1983 arises only through a respondent's personal involvement in a constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). The doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his or her subordinates, is not applicable in § 1983 cases. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-695 (1978).

3. Respondents John Does

Although petitioner's complaint is somewhat unclear about whom he intends to name as John Doe respondents, I understand him to state claims against the correctional officers in his unit to whom he spoke throughout the day. According to petitioner, the officers knew that he was in excruciating pain, promised that his medication was on the way and, nonetheless, allowed him to wait nearly eight hours for the medication. They did not help him get alternative pain medication. Although it is possible that the correctional officers did everything within their power to procure petitioner's medication in a timely manner, this is not clear from the facts alleged. From the facts alleged, it is possible to infer that respondents John Does were deliberately indifferent to petitioner's serious medical needs because they were aware that petitioner was suffering unnecessary pain and disregarded his

pleas for pain relief. Therefore, petitioner will be granted leave to proceed against them.

ORDER

IT IS ORDERED that:

1. Petitioner is GRANTED leave to proceed on his claim against respondents Sandra Sitzman and John Does that these respondents were deliberately indifferent to his need for pain medication when they failed to insure that petitioner's medication was timely delivered following removal of one of his wisdom teeth.

2. Petitioner is DENIED leave to proceed on his claims against respondents Dr. Quisling and Vicki Kamrath, because petitioner has not alleged these respondents' personal involvement in the denial of his Eighth Amendment rights.

3. Respondents Dr. Quisling and Vicki Kamrath are DISMISSED from this action.

4. 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 respondent or to respondent's attorney.

5. 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.

6. The unpaid balance of petitioner's filing fee is \$344.76; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

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

Entered this 12th day of February, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge