IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ROGER GODWIN,

Petitioner,

v.

BELINDA SCHRUBBE,
CHARLES LARSON,
MARK (last name unknown), and
RICK RAEMISCH,

Respondents.

OPINION and ORDER

07-C-208-C

- -

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner Roger Godwin, who is presently incarcerated 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 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).

From petitioner's complaint, I understand petitioner to be alleging the following.

ALLEGATIONS OF FACT

Petitioner Roger Godwin is presently incarcerated at the Jackson Correctional Institution in Black River Falls, Wisconsin. At all times relevant to this complaint, he was housed at the Waupun Correctional Institution in Waupun, Wisconsin.

Respondents Belinda Schrubbe, Charles Larson and Mark (last name unknown) are employed at the Waupun Correctional Institution. Respondent Schrubbe is the manager

of the Health Services Unit, respondent Larson is a doctor and respondent Mark is a nurse. Respondent Richard Raemisch is employed by the Office of the Secretary of the Department of Corrections.

While he was incarcerated at the Waupun Correctional Institution between May 2006 and January 2007, petitioner needed medical care for his back and "skin." Respondent Larson saw petitioner on several occasions; however, he never examined petitioner's back and simply prescribed medications that made petitioner's back pain worse. Petitioner told respondent Larson this, and respondent Larson replied that there was nothing he could do. When petitioner saw respondent Mark, he refused to examine petitioner's back or offer any treatment. He told petitioner also that there was nothing he could do to alleviate his back pain. Petitioner wrote to the Health Services Unit and respondent Schrubbe repeatedly to request for assistance. Respondent Shrubbe did not respond to these requests.

On November 15, 2006, petitioner was experiencing back and chest pain. He put in a request to see respondent Larson, but was not seen or examined by him. On November 21, 2006, petitioner requested to be seen by the Health Services Unit for his back and kidneys. He was not seen or examined. On December 18, 2006, petitioner sent a request to respondent Schrubbe, in which he complained that respondent Mark had refused to treat his back for the second time in a month, that he was still in pain and that he needed treatment. Respondent Schrubbe did not respond to this request. On December 27, 2006,

petitioner submitted another request to the Health Services Unit, in which he stated that he was still in pain and needed to be examined. He was not seen or examined by anyone in response.

On November 30, 2006, petitioner filed an inmate complaint regarding respondent Mark's failure to treat his bladder. This inmate complaint was dismissed. On December 18, 2006, petitioner filed another inmate complaint regarding respondent Mark's failure to examine or treat petitioner. This complaint was dismissed, and petitioner appealed the decision to the secretary of the Department of Corrections. Respondent Raemisch affirmed the dismissal of petitioner's complaint on behalf of the secretary's office.

OPINION

Deliberate indifference to prisoners' serious medical needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a deliberate indifference 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 had a serious medical need and that prison officials were deliberately indifferent to that need. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). "Serious medical needs" encompass (1) conditions that are life-threatening or that carry risk 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.

Deliberate indifference requires that a prison official "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and actually "draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Medical malpractice alone is not equivalent to 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). Deliberate indifference is evidenced by a defendant's actual intent or reckless disregard for a prisoner's health or safety, and must amount to highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

There is little information in petitioner's complaint regarding the severity of his back pain. The limited information there is suggests that petitioner experienced some degree of back pain that caused him to seek medical care and that respondent Larson prescribed medications that made petitioner's back pain worse. At this early stage, petitioner has alleged just enough that it could be inferred that his back condition constituted a serious medical need because it caused him needless pain and suffering. Gutierrez, 111 F.3d at

1371.

With respect to the other element of his claim, petitioner contends that medical staff respondents Schrubbe, Larson and Mark were deliberately indifferent to his need for additional treatment for his back pain. Petitioner has alleged that all three were aware that he was in continuing pain and refused to take any action to alleviate it, in spite of petitioner's repeated requests for treatment. Thus, at this early stage, petitioner has alleged sufficient facts to state a claim for deliberate indifference because it is possible to infer that respondents were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]" and actually drew this inference. Farmer, 511 U.S. at 837. Although petitioner will be granted leave to proceed against respondents Schrubbe, Larson and Mark, he should be aware that, to prevail ultimately on his claim against them, he will need to demonstrate that they were not simply negligent in their treatment of him or that their treatment choices were not the ones petitioner would have preferred. To prevail on his Eighth Amendment claim, petitioner will have to show that respondents Schrubbe, Larson and Mark were aware that their failure to treat him posed a substantial risk to his health or would cause him pain, easily ameliorated, that they disregarded this risk, or caused him to suffer needlessly.

Next, I turn to petitioner's claim that respondent Raemisch was deliberately indifferent to his serious medical needs when he affirmed the dismissal of petitioner's inmate

complaint regarding respondent Mark's care of him. An official is involved sufficiently to establish liability for a constitutional violation "if she acts or fails to act with a deliberate or reckless disregard of petitioner's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). Thus, if petitioner's complaint stated that he was receiving no medical care or treatment and was in excruciating pain as a result, it would be possible to infer deliberate indifference from respondent Raemisch's dismissal of the complaint, which could be construed as consenting to respondents' continued non-treatment of petitioner. That said, it is appropriate for complaint examiners to rely on information from the medical staff in their evaluation of his complaint. E.g., Johnson v. Doughty, 433 F.3d 1001, 1012 (7th Cir. 2006) (Non-medical prison official cannot be held "deliberately indifferent simply because [he] failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor"). However, at this stage, petitioner will be granted leave to proceed against respondent Raemisch as well.

ORDER

IT IS ORDERED that

1. Petitioner Roger Godwin is GRANTED leave to proceed in forma pauperis on his Eighth Amendment claims that respondents Belinda Schrubbe, Charles Larson , "Mark" and

Rick Raemisch were deliberately indifferent to his serious medical needs when they refused to take action with respect to his complaints of pain.

2. 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.

3. 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.

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

Entered this 7th day of May, 2007.

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