

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

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RANDY L. FORSTERLING,

Petitioner,

v.

RICK RAEMISCH, PETER HUIBREGTSE,  
ELLEN RAY, STEVEN SCHELLER and  
MARY MILLER,

Respondents.  
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OPINION and ORDER

08-cv-111-bbc

This is a proposed civil action for monetary and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, contends that respondents have violated his rights under the Eighth Amendment by failing to provide him with adequate dental care. Petitioner requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915, and to be appointed counsel, 28 U.S.C. § 1915(e)(1). Petitioner has paid the full filing fee.

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, 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 (7<sup>th</sup> Cir. 1999); see also Perez v. Wisconsin Dept. Of Corrections, 182 F.3d 532 (7<sup>th</sup> Cir. 1999).

Because petitioner has failed to allege facts from which it may be inferred that respondents Huibregtse, Raemisch, Ray, Scheller and Miller were deliberately indifferent to his serious dental needs, he will be denied leave to proceed on his Eighth Amendment claim. Petitioner's request for appointment of counsel will be denied as moot.

In his complaint, petitioner alleges the following facts.

## ALLEGATIONS OF FACT

### A. Parties

Petitioner Randy L. Forsterling is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin.

Respondent Rick Raemisch is Secretary of the Wisconsin Department of Corrections.

Respondents Peter Huibregtse, Ellen Ray, Steven Scheller and Mary Miller are all employed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Peter Huibregtse is the warden. Respondent Ellen Ray is the inmate complaint examiner. Steven Scheller is the dental supervisor. Mary Miller is the nursing supervisor.

#### B. Petitioner's Dental History

In August 2001, petitioner was placed in the Dodge Correctional Institution and was put on the waiting list to see a dentist for a routine check-up and teeth cleaning. In February 2003, petitioner was transferred to the Wisconsin Secure Program Facility, but did not have his teeth cleaned until May 2006. At that time, petitioner was told that he would be put on a waiting list to see the dentist for x-rays and a routine check-up.

In June 2007, petitioner received his routine check-up and he was told that two of his fillings had fallen out and needed to be refilled. Also, petitioner was told that the two teeth with missing fillings were starting to show "slight decay." He was again put on a waiting list for dental attention. Petitioner's later requests to the dental department to tell him when he would receive his new fillings were not answered. On October 12, 2007, petitioner filed an inmate complaint regarding the long delay in receiving dental attention between 2001, when he was imprisoned and June 2007, when he finally received a check-up. He asked for

speed in caring for the slight decay of two teeth and \$5000 for the Department of Corrections' failure to prevent the decay by providing regular and timely check-ups. He noted that although he brushes his teeth five times a day and flosses his teeth as well, he still wanted to see a dentist for regular check-ups. Three to four days later, he had his teeth cleaned, but he did not receive any new fillings.

On October 24, 2007, respondent Ray affirmed petitioner's complaint with modifications directing respondent Miller to follow up with the dental unit to insure that petitioner's dental needs were addressed. As dental supervisor at the Wisconsin Secure Program Facility, respondent Scheller was also notified about petitioner's dental needs. On November 10, 2007, petitioner appealed Ray's decision to the Correctional Complaint Examiner. In his appeal, petitioner repeated his dissatisfaction with the absence of dental attention from 2001 to 2007 and the continued delay in obtaining filling replacements for two of his teeth. He repeated as well a request for \$5000 compensation.

On November 26, 2007, the corrections complaint examiner recommended dismissal of petitioner's appeal. In her report, the examiner noted that both respondents Miller and Scheller had been directed to address petitioner's dental needs and that petitioner had been put on the priority list for dental attention. On December 10, 2007, the office of the Secretary of the Department of Corrections accepted the corrections complaint examiner's recommendation and dismissed petitioner's complaint. As of February 8, 2008, when he

filed his complaint in this court, petitioner had not had his fillings replaced.

## DISCUSSION

### A. Deliberate Indifference

The Eighth Amendment prohibits prison officials from showing deliberate indifference to prisoners' serious medical needs or suffering. 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 may be inferred that he had a serious medical or dental 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" include (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. Although "dental care is one of the most important medical needs of inmates," Wynn v. Southward, 251 F.3d 588, 593 (7th Cir. 2001) (citation omitted), the importance of dental care does not eliminate the requirement that to state an Eighth Amendment claim the dental need at issue must be "objectively serious," Board v. Farnham, 394 F.3d 469, 479-80 (7th

Cir. 2005).

Examples of “objectively serious” dental needs involve circumstances in which failure to address dental needs have left inmates to suffer from an array of problems, including bleeding gums, headaches, extreme pain, inability to eat properly, cracked teeth and infected gums. See Wynn, 251 F.3d at 593 (citing cases of objectively serious dental needs). Petitioner’s allegations about his dental needs fall well below being serious dental needs. Petitioner does not allege that his missing fillings and the “slight decay” cause him any pain, bleeding or headaches or that he has any trouble eating. In fact, petitioner himself alleges that he did not even know that he was missing fillings until he was told so at a routine check-up. I conclude that petitioner’s need for replacement fillings is not objectively serious, and thus, does not rise to the level of a serious dental need.

Furthermore, it would be an overstatement to consider that petitioner’s allegations that he was denied routine check-ups for a period of six years presents a claim of a serious dental need, especially in light of petitioner’s allegation that he brushes his teeth five times a day and flosses his teeth as well. Petitioner is not alleging that he is being denied the ability to care for his teeth. He merely seeks preventive maintenance, much in the same way a prisoner might desire an annual physical exam. Although I can certainly understand the benefits of such care, respondents’ failure to provide routine preventive dental check-ups, as opposed to care for such conditions as bleeding gums or a broken tooth, does not rise to

the level of a serious dental need.

Finally, because petitioner will be denied leave to proceed on his Eighth Amendment claims his motion for appointment of counsel will be denied as moot.

#### ORDER

IT IS ORDERED that

1. Petitioner Randy Forsterling's request for leave to proceed in forma pauperis is DENIED with respect to his claim that respondents Rick Raemisch, Peter Huibregtse, Ellen Ray, Steven Scheller and Mary Miller exhibited deliberate indifference to a serious dental need and this case is DISMISSED with prejudice for petitioner's failure to state claim upon which relief may be granted;

2. Petitioner's motion for appointment of counsel is DENIED as moot.

3. A strike will be recorded against petitioner pursuant to § 1915(g);

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

Entered this 20th day of March, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge