

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

NICK WILLIAM SCHALLER,

Petitioner,

v.

DOCTOR HEINZL and DR. REYNOLDS,

Respondents.

OPINION and ORDER

08-cv-403-bbc

This is a proposed civil action for declaratory, injunctive and monetary relief brought under 42 U.S.C. § 1983. Petitioner Nick William Schaller, a prisoner, contends that respondents have violated his rights under the Eighth Amendment by failing to provide him with adequate medical care. Petitioner requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. I previously assessed petitioner an initial partial filing fee of \$5.88, which the court has received.

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. 28 U.S.C. § 1915(e).

Because petitioner alleges facts from which it may be inferred that respondent Doctor Heinzl was deliberately indifferent to his serious medical needs, he will be granted leave to proceed on his Eighth Amendment claim against Doctor Heinzl. As for Dr. Reynolds, however, petitioner has alleged no wrongdoing. The complaint will be dismissed as to him.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Nick William Schaller is a prisoner at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Respondents Doctor Heinzl and Dr. Reynolds are employed at the New Lisbon Correctional Institution. Heinzl is a medical doctor. Reynolds is a psychiatrist.

At the end of May, petitioner started asking to see respondent Heinzl about extreme pain in his shattered leg and ankle. He wanted Heinzl to examine his leg and ankle and take x-rays. Respondent Heinzl did not answer his requests but petitioner was always seen by a nurse when he submitted a request. In June the nurses finally notified respondent Heinzl that petitioner needed to be seen right away.

On July 7, 2008, respondent Heinzl saw plaintiff and stated, “Wow, you weren’t lying.” Respondent Heinzl scheduled him for x-rays, which were taken the next day. On July 10, 2008, petitioner did not know what the x-rays revealed. Petitioner believes that because he can still move his rods and pins, respondent Heinzl is still not going to take his situation seriously.

OPINION

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 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 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.

Petitioner alleges that he was having extreme pain in his shattered leg and ankle.

“Extreme pain” constitutes a serious medical need. Cooper v. Casey, 97 F. 3d 914, 916-17 (7th Cir. 1996).

Deliberate indifference may be evidenced by a respondent’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). In this case, petitioner contends that respondent Heinzl was deliberately indifferent to his serious medical need because he did not see him or have his leg and ankle x-rayed as soon as petitioner would have liked. Nurses in the health services unit advised respondent Heinzl that petitioner needed to be seen in June; respondent Heinzl may have been aware of petitioner’s pain as early as May when petitioner first saw a nurse about his leg and ankle. Nonetheless, respondent Heinzl decided not to see petitioner until July 7, 2008, at which time he saw petitioner and had his leg and ankle x-rayed.

Although, petitioner was seen by nurses, petitioner’s allegations allow an inference to be drawn that petitioner required more treatment than the nurses could provide him and that respondent Heinzl knew it, but nonetheless delayed responding. At this early stage, it is possible to infer that respondent Heinzl’s failure to respond sooner to petitioner’s requests amounts to deliberate indifference to a serious medical need. Therefore, petitioner will be granted leave to proceed in forma pauperis on his Eighth Amendment claim against

respondent Heinzl.

As for respondent Reynolds, there are no facts alleged in petitioner's complaint from which I could infer that he was deliberately indifferent to petitioner's serious medical need. Therefore, petitioner will be denied leave to proceed in forma pauperis on his Eighth Amendment claim against respondent Reynolds .

ORDER

IT IS ORDERED that

1. Petitioner Nick William Schaller's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondent Doctor Heinzl exhibited deliberate indifference to his serious medical needs.

2. Petitioner Nick William Schaller's request for leave to proceed in forma pauperis is DENIED with respect to his claim that respondent Dr. Reynolds exhibited deliberate indifference to his serious medical needs for failure to state a claim upon which relief may be granted; respondent Reynolds is DISMISSED from this case.

3. For the remainder of this lawsuit, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer that will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the

court's copy that plaintiff has sent a copy to defendant or to defendant's attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. 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 defendants.

6. Because I have dismissed one or more claims asserted in plaintiff's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against petitioner.

Entered this 5th day of September, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge