

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

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LAMONT E. MOORE,

Plaintiff,

v.

DR. GLEN HEINZL,

Defendant.

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ORDER

10-cv-390-bbc

In this proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Lamont Moore contends that defendant Dr. Glen Heinzl violated his rights under the Eighth Amendment by failing to provide him adequate medical treatment. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that 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. § 1915A. 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).

After reviewing plaintiff's complaint, I conclude that plaintiff may proceed on his claim that defendant exhibited deliberate indifference to his medical needs in violation of the Eighth Amendment. However, I will stay a decision on whether plaintiff may proceed on his state law medical negligence claim against defendant because plaintiff has failed to allege that he filed a notice of claim with the attorney general's office that has been disallowed. I will give plaintiff an opportunity to supplement his complaint to provide this information.

#### ALLEGATIONS OF FACT

Plaintiff Lamont Moore is a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin. He was formerly incarcerated at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Defendant Dr. Glen Heinzl is a doctor employed at the New Lisbon Correctional Institution.

On the morning of May 12, 2006, plaintiff could not open his eyes because they were extremely sensitive to the light. He could not see anything. Because it was a weekend, plaintiff had to wait to see a doctor. When he did, he was sent to an eye station where the doctor said he was suffering from uveitis. He was given medications that did not help his condition. After plaintiff complained to Dr. Heinzl, Heinzl ordered a blood test. The results

of the test came back positive for a blood disease. Heinzl did not attempt to determine the specific blood disease. Heinzl diagnosed glaucoma and sent plaintiff to the University of Wisconsin Hospitals for treatment. Plaintiff saw numerous doctors at the hospital, but he did not respond to medications specifically made for glaucoma.

Eventually, plaintiff's condition became so serious that he needed surgery to keep from going blind. Plaintiff ended up with tubes in his eyes, artificial lenses and a ruptured optic nerve in his left eye. After the surgery, the left side of plaintiff's face began to droop. He began to have symptoms of cardiac arrest and severe pain in his lower back and hip area, as well as headaches and inflammation in his eyes that would not go away.

Four years later, while residing at the Waupun Correctional Institution, a doctor ordered another blood test that was positive for a blood disease. The doctor discovered that the blood disease was Lyme disease and began treating plaintiff for the disease. After plaintiff began treatment, most of his previous symptoms were alleviated. Plaintiff no longer experiences symptoms of cardiac arrest, headaches, backaches, hip pain, eye pain or blurred vision. The only symptom that remains is inflammation in the back of plaintiff's eyes. However, plaintiff is permanently scarred from his previous surgeries and the left side of his face has not regained muscle control.

## DISCUSSION

Plaintiff contends that defendant's failure to determine whether plaintiff was suffering from a particular blood disease constitutes deliberate indifference to his medical needs in violation of the Eighth Amendment and medical negligence under Wisconsin law.

### A. Eighth Amendment

Under the Eighth Amendment, a prison official may violate a prisoner's right to medical care if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996) or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994).

"Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the

Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. Gutierrez, 111 F.3d at 1374; Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole, 94 F.3d at 261-62.

Plaintiff alleges that he complained to defendant about eye problems and pain and defendant ordered a blood test. Although the test was positive for a blood disease, defendant did not attempt to determine the nature of the disease but made a diagnosis of glaucoma and sent plaintiff to the hospital for treatment. Plaintiff received treatment for glaucoma for four years, including multiple surgeries, but he continued to experience pain and other physical problems. As it turns out, plaintiff did not have glaucoma; rather, he had Lyme disease, which was diagnosed by another prison doctor four years later. Plaintiff contends that if defendant had tested his blood properly, he could have diagnosed plaintiff's Lyme disease and he could have received immediate treatment. Instead, plaintiff suffered for four years and has permanent injuries.

Plaintiff's allegations suggest that he had a serious medical need of which defendant was aware. If I construe plaintiff's complaint liberally, it is possible to infer that defendant acted with deliberate indifference by failing to determine the nature of plaintiff's blood test results and the correct course of treatment. These allegations are enough at this stage for plaintiff to proceed on his Eighth Amendment claim against defendant. However, plaintiff should be aware that in order to prove his Eighth Amendment claim, it will not be enough to show that defendant made an incorrect diagnosis or gave plaintiff the wrong treatment. Instead, plaintiff will have to show that defendant failed to use medical judgment in his treatment of plaintiff.

#### B. Medical Negligence

Plaintiff contends that defendant's actions also constitute medical negligence under Wisconsin law. However, when an individual intends to sue a government official acting in his official capacity, Wisconsin law requires the individual to file a notice of claim with the attorney general's office. The individual cannot bring suit until the claim has been disallowed or rejected. Ibrahim v. Samore, 118 Wis. 2d 720, 726, 348 N.W.2d 554, 558 (1984) ("The notice of injury statute 'is not a statute of limitation but imposes a condition precedent to the right to maintain an action.'"). Wis. Stat. § 893.82(3m) states:

If the claimant is a prisoner, as defined in s. 801.02 (7)(a)2., the prisoner may

not commence the civil action or proceeding until the attorney general denies the claim or until 120 days after the written notice under sub. (3) is served upon the attorney general, whichever is earlier.

In his complaint, plaintiff does not say whether he has filed a notice of claim that has been disallowed. Because this is a threshold requirement for filing a state law claim against defendant, I will stay a decision on whether to grant plaintiff leave to proceed on his state law claim for medical negligence and give plaintiff an opportunity to supplement his complaint with this information. Upon receiving plaintiff's supplement, I will screen his state law claim and arrange for service of the complaint and supplement on defendant. If plaintiff fails to supplement his complaint by August 24, 2010, I will deny him leave to proceed on his state law claim and dismiss that claim.

#### ORDER

IT IS ORDERED that

1. Plaintiff Lamont Moore is GRANTED leave to proceed on his claim that defendant Dr. Glen Heinzl violated his rights under the Eight Amendment by failing to provide him adequate medical treatment.

2. A decision on plaintiff's request for leave to proceed on his medical negligence claim against defendant is STAYED. Plaintiff may have until August 24, 2010, in which to supplement his complaint with information about whether he filed a notice of claim with the

attorney general's office. If plaintiff does not submit a supplement to his complaint on or before that date, his state law claim will be dismissed.

3. Service of the complaint on defendant is STAYED pending receipt and screening of plaintiff's supplement to his complaint.

Entered this 12th day of August, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge