

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

LAMONT D. WALKER,

Plaintiff,

v.

OPINION AND ORDER

10-cv-656-slc

LESLEY BAIRD, RYAN TOBIAZ,
CAPTAIN HIGBEE, TRAVIS BITTELMAN,
DALIA SULIENE, and C.O. PALMER,

Defendants.

This is a proposed civil action in which plaintiff Lamont D. Walker alleges that defendants violated his Eighth Amendment rights. He alleges that defendants C.O. Palmer, Lesley Baird and Dalia Suliene were deliberately indifferent to his medical needs and that defendants Baird, Ryan Tobiaz, Captain Higbee and Travis Bittelman subjected him to cruel and unusual punishment when they kept him in a dirty cell for three to four days.

Walker seeks leave to proceed in forma pauperis, *see* 28 U.S.C. § 1915 and has consented to magistrate judge jurisdiction over his lawsuit. From Walker's financial affidavit, I conclude that plaintiff presently has no means with which to pay an initial partial payment of the \$350 filing fee.

Next, the court must determine whether Walker's proposed action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). 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).

PLAINTIFF'S ALLEGATIONS

In his complaint, Walker alleges the following facts, which the court must accept as true for purposes of this screening order:

I. Parties

Plaintiff Lamont D. Walker is an inmate at the Columbia Correctional Institution in Portage, Wisconsin. Defendants Lesley Baird and Ryan Tobiaz are psychological associates at the institution. Defendant Higbee is a captain and defendants Travis Bittelman and C. O. Palmer are correctional officers at the institution. Defendant Dalia Suliene is a medical doctor at the institution.

II. Request for Psychological Services

On June 23, 2010, Walker “constantly advised” the “observation checker” that he needed to see a psychologist. He also told defendant Palmer that he was having a psychological defect and needed to see a psychologist. Two and a half hours later defendant Baird, a psychologist, told Walker that she was not going to see him because he was tapping on the door trying to get her attention. Before Baird left the tier, Walker asked her if she could assist him because he was having a psychological defect. Baird told him that if Walker wanted to see her he had to submit a written request. Because Baird refused to see him, Walker took a large amount of pills to overdose. Walker was taken to the hospital for treatment of the overdose and then placed on observation status in the same cell he had been in.

III. Conditions of Observation Cell

In the early morning of June 24, defendant Bittelman informed Walker that he was being moved to an observation cell. Walker asked Bittelman for something to cover his feet for the walk to the observation area. Bittelman refused to get him anything to cover his feet, escorted him to the observation area and placed him in cell #48. Walker told Bittelman the cell was dirty and had brown and red substances on the wall, which appeared to Walker to be dried feces and dried blood. He repeatedly told Bittelman that the cell was dirty, that it smelled and that it had ants on the surfaces.

The same day Baird approached Walker's cell to evaluate him. Walker told Baird that because she had disregarded his request to speak to her the day before, he had overdosed on pills. Baird walked off. She returned the next day. Walker told her that he should not be kept in observation status. Baird told him he had to stay in observation because there wouldn't be any psychological service on the weekend. Walker asked Baird for his personal property, but she refused to give it to him. He was kept in the dirty observation cell for three to four days with no coverings for his feet. Because of these conditions, he got athlete's foot.

Walker informed defendants Baird and Higbee of the unsanitary condition of his cell. Higbee had the unit janitor sanitize the cell while Walker was in the day room for a blood pressure check. When Walker returned to his cell he believed it was in same condition.

On June 17, defendant Tobiaz came to Walker's cell. Walker asked to be released from observation status. Tobiaz refused.

IV. Failure To Treat Athlete's Foot

At the end of June 2010 or the beginning of July 2010 Walker saw Dr. Suliene because he refused to have a TB shot. Walker told Suliene that he was suffering from athlete's foot, but she did not treat it. He told Suliene that it hurt when he separated his toes. Dr. Suliene never treated plaintiff's athlete's foot although he sent numerous health service requests.

OPINION

I. Deliberate Indifference to Medical Needs

Walker claims that defendants Palmer and Baird were deliberately indifferent to his psychological illness and defendant Suliene was deliberately indifferent to his athlete's foot. 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 plaintiff 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 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.

A prison official acts with deliberate indifference when the official "knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk." *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002)).

Suicide and suicide attempts pose a serious risk of harm to a prisoner's health and safety. *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996). Unlike traditional medical and mental illnesses, the harm is created by the prisoner and requires those supervising his or her incarceration to intervene. If a prison official fails to intervene when a prisoner poses a serious threat of suicide, then the official is disregarding a serious medical need because the inmate poses a substantial risk of harm to him or herself. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm"); *Sanville v. McCaughtry*, 266 F.3d 724, (7th Cir. 2001). An inmate need not engage in self-harm or attempt suicide for a prison official to be found deliberately indifferent to the inmates' condition. *Farmer*, 511 U.S. at 845 ("deliberate indifference does not require a prisoner seeking 'a remedy for unsafe conditions [to] await a tragic event").

In this case, Walker told both Palmer and Baird that he needed psychological services. In reading these allegations generously, as the court is required to do, an inference can be drawn that Palmer and Baird knew that Walker posed a serious risk to himself and disregarded it. Walker will, therefore, may proceed on his claim that defendants Baird and Palmer were deliberately indifferent to such a need.

Next, Walker alleges that defendant Suliene was deliberately indifferent to his athlete's foot. Although he alleges that his toes hurt when he separated them he does not allege that he was in continuous or serious pain. Walker has not alleged facts from which an inference can be made that his athlete's foot was a serious medical need. Therefore, he will not be allowed to proceed on his claim that defendant Suliene was deliberately indifferent to it.

II. Conditions of Confinement

Walker contends that defendant Baird, Bittelman, Higbee, and Tobiaz kept him in a dirty cell for three or four days. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." *Farmer*, 511 at 832. In order to constitute cruel and unusual punishment under the Eighth Amendment, conditions of confinement must be extreme. General "lack of due care" by prison officials will never rise to the level of an Eighth Amendment violation because "it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

To demonstrate that prison conditions violated the Eighth Amendment, a prisoner must allege facts that satisfy a test involving both an objective and subjective component. *Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1994). The objective analysis focuses on whether prison conditions "exceeded contemporary bounds of decency of a mature, civilized society." *Id.* The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to petitioner. *Id.*

Walker alleges that he was placed in an observation cell that had dried feces and blood on the walls and ants on surfaces for three to four days. The Constitution does not mandate that prison cells be comfortable, or even clean. Courts examining challenges to prison cell conditions have repeatedly held that short periods of confinement in unsanitary conditions do not rise to the level of a constitutional violations. *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988) (depriving prisoner of toilet paper, soap, toothpaste and toothbrush while keeping

him in filthy, roach-infested cell for a period of several days was not a constitutional violation); *Morissette v. Peters*, 45 F.3d 1119, 1122-23, n.6 (7th Cir. 1995) (plaintiff's "filthy" cell and inadequate cleaning supplies did not violate Eighth Amendment). Walker's allegations that he was kept in an unsanitary cell for three to four days do not rise to the level of cruel and unusual deprivations of the minimal measure of life's most basic necessities. It is unnecessary, therefore, to consider whether defendants were deliberately indifferent to the conditions.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Lamont D. Walker's request for leave to proceed *in forma pauperis* on his Eighth Amendment claim that defendants Lesley Baird and C. O. Palmer were deliberately indifferent to his serious risk of self-harm is GRANTED.
- (2) Plaintiff's request to proceed *in forma pauperis* on his Eighth Amendment claims against defendants Ryan Tobiaz, Captain Higbee, Travis Bittelman and Dalia Suliene is DENIED.
- (3) For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.
- (4) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- (5) Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

- (6) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants Baird and Palmer. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 7th day of January, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge