

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

TOMMIE CARTER,

Plaintiff,

OPINION AND ORDER

v.

TIMOTHY GILBERG and
SERGEANT REID,

12-cv-350-wmc

Defendants.

Plaintiff Tommie L. Carter brings this action under 42 U.S.C. § 1983 alleging that two corrections officers at the Wisconsin Secure Program Facility (“WSPF”) violated his constitutional right to receive treatment for a serious medical need. Carter requests leave to proceed without prepayment of fees and costs. After considering that request and supporting documentation provide by Carter, the court has determined that he qualifies for indigent status for purposed of the federal *in forma pauperis* statute, 28 U.S.C. § 1915, and Carter made an initial payment toward the full filing fee for this lawsuit. Because Carter is incarcerated, the Prison Litigation Act also requires the court to determine whether the proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). After examining the complaint, the court finds that the proposed action clears this hurdle as well and will grant Carter leave to proceed with his claims again both officers.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant’s pleadings, the court must construe the allegations generously, and hold the complaint “to less stringent standards than formal pleadings drafted

by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Carter alleges, and the court assumes for purposes of this screening order, the following facts.

Plaintiff Tommie Carter is currently confined in the Wisconsin Department of Corrections at the Green Bay Correctional Institution. At all times pertinent to the complaint, however, he was in custody at WSPF, which is located in Boscobel. Defendant Timothy Gilberg is a correctional officer at WSPF with the rank of captain. Defendant Sergeant Reid also works as a correctional officer at WSPF.

On December 15, 2011, Carter was under “clinical observation” for unspecified reasons. Carter summoned Sergeant Reid over the intercom and asked for his inhaler, advising that he was having an asthma attack and could not breathe. Reid refused to provide the inhaler, stating that he had been ordered by Captain Gilberg not to pass him anything through the door. Captain Gilberg then came to the cell door. Carter repeated his request for the inhaler, and Gilberg refused to give it to him.

Some time later, Carter passed out as a result of his inability to breathe, hitting his head on the concrete floor of his cell. Carter filed a complaint with the Department of Corrections. The complaint examiner agreed that Carter “should have been given his inhaler if he was having breathing problems.”

OPINION

Carter seeks relief for civil rights violations pursuant to 42 U.S.C. § 1983. To establish liability under § 1983, a plaintiff must establish that (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) the defendant intentionally caused that deprivation; and (4) the defendant acted under color of

state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009); *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989).

Carter's proposed complaint outlines a violation of the Eighth Amendment of the United States Constitution, which requires the state to "provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Prison officials who do not provide adequate medical care to prisoners may violate the Eighth Amendment because such failures may cause pain and suffering, which "serve[s] no penological purpose." *Id.* Because "society does not expect that prisoners will have unqualified access to health care," *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), an inmate's untreated medical needs must nevertheless be objectively serious. *Id.* at 9-10; *Estelle*, 429 U.S. at 104. Serious medical conditions include: (1) those 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/or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997). To state an Eighth Amendment violation, Carter must also show that the failure to treat was the result of "deliberate indifference" to his medical condition. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). Inadvertent error, negligence or gross negligence are insufficient grounds for invoking the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996).

In this case, Carter essentially alleges that: (1) he suffered from asthma-induced breathing trouble; (2) his condition was recognized to the extent WSPF officers had access to his inhaler; and (3) without access to his inhaler, he would eventually lose consciousness.

This sufficiently articulates an objectively serious medical condition. Carter also alleges that he communicated his need for the inhaler to Sergeant Reid and Captain Gilberg, but that his requests were summarily denied. Although the claim against Sergeant Reid presents a closer question, Carter's allegations create an inference that both defendants were aware of, but deliberately indifferent to, a serious medical need. At this early screening stage, Carter's allegations are sufficient to state an Eighth Amendment claim.

Although Carter's allegations pass muster under the court's lower standard for screening, he will have to present admissible evidence permitting a reasonable trier of fact to conclude that defendants acted with deliberate indifference to his serious medical need to be successful on his claim, which is a high standard. Inadvertent error, negligence or even gross negligence are all insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). In particular, it will be Carter's burden to prove: (1) his condition constituted a serious medical need; and (2) perhaps even more daunting, that the defendants knew his condition was serious, caused associated pain and suffering, could be relieved by prescription medication and deliberately ignored his need for this medication. Both elements may well require Albrecht to provide credible, expert testimony from a physician in the face of medical evidence to the contrary.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Tommie Carter's request for leave to proceed on his Eighth Amendment claim against defendants Timothy Gilberg and Sergeant Reid is GRANTED.

- (2) 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 the defendants. 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
- (3) For the time being, 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.

Entered this 15th day of July, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge