

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

JOHN L. DYE, JR.,

Plaintiff,

v.

BRYAN BARTOW, MARY KLEMZ,
CATHY A. JESS, LARRY JENKINS,
ROBERT HUMPHREYS, GAANAN,
BARBARA WAEDEKIN, THERESA BARWELL,
THOMAS MICHLOWSKI, STEVE SPANBAUSE,
MARY VANDE SLUNT, CHARLES FACKTOR,
CINDY O'DONNELL, EDWARD F. WALL,
LOYDA LORIA, and JOHN DOES,

Defendants.

OPINION AND ORDER

13-cv-284-bbc

In his amended complaint for injunctive relief, plaintiff John L. Dye, Jr., contends that defendants have violated his constitutional rights by refusing his repeated requests for a full-sized toothbrush, which he says he needs because he suffers from a deformed right thumb and finds it painful to brush his teeth with his right hand when required to use a short-handled toothbrush. Plaintiff is a prisoner housed at the Wisconsin Resource Center. He seeks leave to proceed in forma pauperis. He contends that defendants are keeping him from gaining access to the legal loan he needs to litigate this case.

At the outset, I note that plaintiff has styled his pleading as a petition for a writ of mandamus under 28 U.S.C. § 1361. However, plaintiff cannot proceed under the federal

mandamus statute because a federal district court has no authority to grant mandamus relief against state officials. Robinson v. Illinois, 752 F. Supp. 248, 248-49 (N.D. Ill. 1990) (citing 28 U.S.C. § 1361, which restricts federal mandamus jurisdiction to actions against “an officer or employee of the United States or any agency thereof”). Even if I treat the pleading as a complaint brought under 42 U.S.C. § 1983 and construe it liberally, plaintiff cannot go forward because he has not stated a claim upon which relief can be granted. Accordingly, the complaint will be dismissed.

In his amended pleading, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff John Dye is a prisoner in the custody of the Wisconsin Department of Corrections. He suffers from a “chronic mallet deformed right thumb” that may cause “traumatic arthritis.” For safety reasons, the Wisconsin Resource Center requires inmates to use small, short-handled toothbrushes. However, these toothbrushes aggravate the pain in plaintiff’s right thumb when he brushes his teeth. His repeated requests for a toothbrush with a longer handle have been denied by Wisconsin Resource Center staff.

Plaintiff first requested a full-sized toothbrush during a previous period of detention at the Wisconsin Resource Center in 2008 and 2009. As part of a grievance procedure, plaintiff was examined by defendant Loyda Loria on November 5, 2008 and April 29, 2009. Loria found that plaintiff had “full range of motion” and “no inflammation or deformities . . . that would limit the movement of his hands and wrists.” As a result of her findings, plaintiff’s request for a longer toothbrush was denied at that time.

When plaintiff returned to the Wisconsin Resource Center in 2013, he renewed his request. On January 28, 2013, he met with defendant Dr. Gaanan and told him about his deformed right thumb. Gaanan reviewed plaintiff's medical record and told plaintiff that he would speak with other Wisconsin Resource Center medical staff about plaintiff's request for a full-size toothbrush. In addition to speaking with defendant Gaanan, plaintiff made a written request for a normal-sized toothbrush to defendants Barbara Waedekin, Robert Humphreys, Bryan Bartow, Larry Jenkins, Thomas Michlowski, Cathy A. Jess, Mary Klemz and other Department of Corrections officials. Klemz replied on February 26, 2013, stating that she had no instruction from the medical department to give plaintiff a full-size toothbrush.

Plaintiff followed up with Gaanan on March 5, 2013 during a routine check-up, saying again that brushing with the short-handled toothbrush was causing him pain. Gaanan examined plaintiff's thumb, increased his pain medication and told plaintiff that he was still waiting for a response from his superiors.

On March 27, 2013, plaintiff received a response from Klemz, telling him that Gaanan had denied plaintiff's request. Klemz advised plaintiff to brush his teeth with his other hand or to scrub his teeth with a washcloth rolled around his index finger. After failing yet again to get a toothbrush with a longer handle, plaintiff filed a complaint with this court.

DISCUSSION

A. Imminent Danger

Plaintiff has moved to proceed in forma pauperis in this case under 28 U.S.C. § 1915.

From information he has provided in his filings in this and previous cases, I find that he qualifies financially for in forma pauperis status. However, as plaintiff is aware from a previous case in this court, case no. 11-cv-443-bbc, he has “struck out” under 28 U.S.C. § 1915(g), and thus cannot proceed in forma pauperis unless he alleges that he is in imminent danger of serious physical harm. Section 1915(g) states as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

To meet the imminent danger requirement of 28 U.S.C. § 1915(g), a prisoner must allege a physical injury that is imminent or occurring at the time the complaint is filed and show that the threat or prison condition causing the physical injury is real and proximate. Ciarpaglini v. Salini, 352 F.3d 328, 330 (7th Cir. 2003) (citing Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)); Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002). In his complaint, plaintiff alleges that he suffers from “chronic mallet deformed right thumb” and endures pain in his right hand when brushing his teeth with the short-handled toothbrushes issued by the Wisconsin Resource Center.

When considering whether plaintiff’s complaint meets the imminent danger requirement of § 1915(g), a court must follow the well-established proposition that pro se complaints must be liberally construed. Ciarpaglini, 352 F.3d at 330. In addition, it is improper to adopt a “complicated set of rules [to discern] what conditions are serious enough” to constitute “serious physical injury” under § 1915(g). Id. at 331. In light of this

generous framework, I conclude that even if plaintiff's allegations qualify under the imminent danger standard, which seems unlikely, he has failed to state a claim upon which relief may be granted.

B. Screening Plaintiff's Claim

Courts must construe pro se complaints liberally and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B). Plaintiff's complaint fails on the third ground, failure to state a claim upon which relief can be granted.

Under the Eighth Amendment, a prison official violates 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). However, the deliberate indifference standard is high. It is evidenced by a defendant's actual intent or reckless disregard for a prisoner's healthy 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).

Plaintiff alleges that defendants Waedekin, Bartow, Jenkins, Humphreys, Jess, Michlowski and other officials were deliberately indifferent because they did not personally respond to his written request for a longer toothbrush. However, plaintiff received a written response on February 25, 2013 from Klemz sent on behalf of Department of Corrections administration as well as Wisconsin Resource Center medical staff, explaining that the

medical department had not indicated that a regular toothbrush was necessary and directing plaintiff to address his request to his treatment team.

Plaintiff received a second letter from Klemz dated March 27, 2013, telling him that Dr. Gaanan had reviewed plaintiff's request and denied it. In the letter, she suggested alternatives to brushing with the right hand such as brushing with the left hand, using another finger on the right hand or a washcloth rolled around an index finger. Although plaintiff may not be satisfied with this response, defendants gave attention to plaintiff's request and suggested reasonable alternatives to brushing with his deformed thumb when his request was denied. I cannot conclude that these defendants were deliberately indifferent to plaintiff's situation.

Plaintiff also alleges that Gaanan was deliberately indifferent to plaintiff's serious medical needs because he refused plaintiff's verbal request for a full-size toothbrush. Gaanan has met with plaintiff multiple times regarding his thumb. He also reviewed plaintiff's medical records, examined his thumb and increased his pain medication. Although Gaanan denied the toothbrush request, it does not follow that he was deliberately indifferent to plaintiff's medical condition.

Even if plaintiff could show that any of the defendants had been deliberately indifferent to his problem, he cannot show that he has a serious medical need, that is, a condition that falls into one of the following categories: (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 v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997). Plaintiff is not asking the Wisconsin Resource Center staff to treat a life-threatening medical condition or one that carries a risk of permanent serious impairment if left untreated or even one that results in needless pain and suffering if not treated. Unlike an inmate who is wholly at the mercy of medical staff for care and attention of painful or life-threatening conditions, plaintiff has it within his own power to avoid the pain and suffering he says he is experiencing by simply using his left hand to hold his toothbrush or wash his teeth with a washcloth. Thus, I cannot conclude that plaintiff’s situation rises to the level of a “serious medical need” that results in needless pain and suffering.

Finally, plaintiff requests that this court order the defendants to stop impeding his access to a legal loan obtained prior to his transfer to the Wisconsin Resource Center. Plaintiff alleges that the loan is necessary for him to be able to continue litigating this case. Because I am dismissing plaintiff’s complaint, there is no need to address this issue.

ORDER

IT IS ORDERED that

1. Plaintiff John L. Dye, Jr., is DENIED leave to proceed on his claim that defendants violated his constitutional rights by refusing to give him a normal-sized toothbrush. Plaintiff’s complaint is DISMISSED for failure to state a claim upon which relief may be granted.

2. Plaintiff is obligated to pay the \$350 filing fee for this case in monthly payments as described in 28 U.S.C. § 1915(b)(2). The court will notify the officials at the Wisconsin

Resource Center of that institution's obligation to deduct payments until the filing fee is paid in full.

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 15th day of July, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge