IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ANDREW PHILLIPS,

Plaintiff,

v.

DR. CHARLES LARSON, BELINDA SCHRUBBE
and SERGEANT LEHMAN, DR. ELSA HORN,
WILLIAM MCCREEDY, JAMES GREER
and DR. DAVID BURNETT,

Defendants.

ORDER

13-cv-29-bbc

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In case no. 08-cv-362-bbc, plaintiff Andrew Phillips, a prisoner currently housed at the Oakhill Correctional Institution, contended that prison officials violated his Eighth Amendment rights by failing to provide adequate medical care for his severe back and leg pain. In a December 18, 2008 order, I granted plaintiff's motion to dismiss the case without prejudice because he did not want to proceed without counsel.

On January 2, 2013, plaintiff filed a motion stating that he had still not found counsel but that he would like to reopen the case because the statute of limitations on his claims was running out. I denied the motion to reopen but told plaintiff that he could bring his claims in a new case.

Now plaintiff has done so and has paid the full $350 filing fee. Although plaintiff has paid the filing fee, his complaint must be screened pursuant to 28 U.S.C. § 1915A because

he is a prisoner. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. 42 U.S.C. § 1915(e).

Plaintiff has submitted a complaint identical to the one he filed in case no. 08-cv-362-bbc. Accordingly, plaintiff will be allowed to proceed against the same defendants (Larson, Schrubbe and Lehman) as last time. Just as his claims against defendants Horn, McCreedy, Greer and Burnett were dismissed in the previous case, they will be dismissed in this case. I will attach copies of the court's July 30, 2008 and August 27, 2008 screening orders from case no. 08-cv-362-bbc to this opinion.

ORDER

IT IS ORDERED that

1. Plaintiff Andrew Phillips is GRANTED leave to proceed on the following claims:

a. defendants Dr. Charles Larsen and Belinda Schrubbe did not adequately address his need for treatment for his ongoing back pain; and

b. defendant Sergeant Lehman was deliberately indifferent to plaintiff's serious medical needs when he denied plaintiff his pain medication on May 3, 2008.

2. Plaintiff is DENIED leave to proceed on his claims against defendants Elsa Horn, William McCreedy, James Greer and David Burnett. Those defendants are DISMISSED

from the lawsuit.

3. Under 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 state 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 on behalf of the state defendants.

4. For the time being, plaintiff must send defendants a copy of every paper or document that 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.

5. 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.

Entered this 29th day of March, 2013.

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

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ANDREW PHILLIPS,

OPINION and ORDER

Plaintiff,

08-cv-0362-bbc

v.

DR. CHARLES LARSEN, BELINDA SCHRUBBE,
DR. ELSA HORN, WILLIAM McCREEDY,
JAMES GREER, DR. DAVID BURNETT,
SERGEANT LEHMAN,

Defendants.

- -

This is a claim for monetary relief brought under 42 U.S.C. § 1983. Plaintiff Andrew Phillips is a prisoner housed at the Kettle Moraine Correctional Institution. Plaintiff asserts that he suffers from severe back pain and contends that defendants Dr. Charles Larsen, Belinda Schrubbe, Dr. Elsa Horn, William McCreedy, James Greer, Dr. David Burnett and Sergeant Lehman violated his Eighth Amendment rights by failing to provide adequate medical care for his pain.

Although plaintiff has paid the filing fee in full, his complaint must be screened pursuant to 28 U.S.C. § 1915A because he is a prisoner. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money

damages from a defendant who is immune from such relief. 42 U.S.C. § 1915(e).

Plaintiff alleges the following facts in his complaint.

ALLEGATIONS OF FACT

Plaintiff Andrew Phillips is a prisoner housed at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Before he was moved to the Kettle Moraine Correctional Institution in October 2007, he was housed at the Waupun Correctional Institution in Waupun, Wisconsin.

Defendant Charles Larsen is a doctor who worked at the Waupun Correctional Institution. Defendant Belinda Schrubbe is a health services unit manager at the Waupun Correctional Institution. Defendant Elsa Horn is a doctor at the Kettle Moraine Correctional Institution and defendant William McCreedy is a health services unit manager at the Kettle Moraine Correctional Institution. Defendant James Greer is the director of the Bureau of Health Services. Defendant David Burnett is a doctor and the medical director of the Bureau of Health Services. Defendant Sergeant Lehman is a security officer at the Kettle Moraine Correctional Institution.

Plaintiff suffers from severe back and leg pain, as well as tingling and numbness in his legs and a burning sensation in his tailbone. He experiences recurring partial paralysis, loss of control of his bowels and sleeplessness. Because he cannot walk more than 20 to 30 yards, he must get rides everywhere he goes inside the institution.

Before he was incarcerated, plaintiff had been prescribed lidocaine patches for back

pain. While housed in the Forest County jail as he awaited trial, and during the time he was housed at the Dodge Correctional Institution in February 2006, plaintiff was prescribed several medications for severe back pain, including steroid injections, methadone and lidocaine patches.

As part of the intake procedures at the Waupun Correctional Institution on March 10, 2006, plaintiff had an appointment with defendant Larsen. During the appointment he told Larsen about the medication he had been prescribed for back pain. Plaintiff also informed defendant Larsen that medical staff at the Dodge Correctional Institution told plaintiff that the Waupun Correctional Institution medical staff would arrange for him to be seen by a neurosurgeon. During the appointment, defendant Larsen called defendant Schrubbe into the room to discuss the lidocaine patches. Defendant Schrubbe arranged for plaintiff to have scheduled daily passes to the health services unit so that the patches could be administered.

On March 13, 2006, defendants Schrubbe and Larsen told plaintiff that the lidocaine patches were "a pain in the ass" and offered plaintiff an equivalent dose of other pain medications. Plaintiff agreed to take the other medications. During this meeting with defendants, plaintiff requested a consultation with a neurologist and defendants told him to wait to see how the medications worked for him.

The pain medication did not work as well as the lidocaine. At an appointment with defendant Larsen on March 31, 2006, plaintiff reported that his pain was excruciating, asked for more pain medication and again requested a consultation with a neurologist. Defendant

Larsen told him that he did not meet the criteria for a consultation.

On June 15, 2006, plaintiff was unable to feel the lower half of his body for thirty minutes and had spasms after this. Plaintiff requested an appointment with the doctor but did not see defendant Larsen again until July 6, 2006.

During the July 6, 2006, appointment, plaintiff again requested a neurological consultation and was told by defendant Larsen that he did not meet the criteria. At this appointment, plaintiff informed defendant Larsen that despite doing the stretches and exercises Larsen had recommended, he still had severe back pain. After plaintiff again asked to see a specialist, defendant Larsen said that he had given plaintiff methadone, an extra pillow and a mattress and asked plaintiff, "What else do you want me to do?" Larsen also told plaintiff that he had "met the State's obligation by seeing him" and that "they will not pay for you to see a specialist." Larsen said "your pain is your pain, it is not my pain . . . it is your problem, not my problem . . . so deal with it." The appointment ended when Larsen told plaintiff to "get the hell out of my office" and "if you want to see me again, make another appointment." When plaintiff filed a grievance against Larsen after this appointment, the inmate complaint examiner refused it; the grievance was returned to plaintiff with instructions to contact defendant Schrubbe.

Plaintiff wrote to defendant Schrubbe on July 10, 2006, and told her about his July 6, 2006, appointment with defendant Larsen. Schrubbe responded on August 14, 2006, and said that Larsen was addressing plaintiff's medical needs and that plaintiff should try Larsen's recommendations. Schrubbe advised plaintiff to follow the plan and let defendant

Larsen know at the next follow-up if it was not effective.

On October 6, 2006, plaintiff requested an appointment with defendant Larsen because plaintiff had developed a ball-like object in his back and was suffering from severe back pain, muscle spasms and constipation. Plaintiff was told by a nurse that a sick call appointment had been arranged. A few days later, plaintiff was told that he would not be able to see the doctor until the next month. By November 20, 2006, plaintiff suffered from numb legs and a burning sensation in his tailbone and he had to bend at the waist when he walked in order to relieve some of his back pain. Plaintiff requested another appointment with defendant Larsen. On November 22, 2006, plaintiff was seen by other medical staff, who told him he would be scheduled to see the doctor soon. A nurse instructed him to request another appointment if his condition became worse. On December 22, 2006, plaintiff was told by a nurse that there was a mistake in the schedule and plaintiff would not be seeing the doctor.

On January 2, 2007, plaintiff had an appointment with Dr. Lemke at the Waupun Correctional Institution. After examining plaintiff, Lemke submitted a request for plaintiff to be sent to UW Hospital in Madison for a consultation with a neurosurgeon. As a part of the evaluation of his spine, plaintiff also had an MRI, a myelogram and CT-L Spine test. These tests showed that plaintiff had several conditions, including severe central spinal stenosis, severe bilateral foraminal stenosis, small disk protrusion and probable Baastrupt's disease.

On May 16, 2007, plaintiff had an appointment with a neurological surgeon at UW

Hospital in Madison, who recommended that plaintiff undergo decompression and fusion surgery on his spine to reduce pressure on his nerves and alleviate his pain. The surgeon also advised plaintiff to "go as long as he [could] before considering the surgery because it might not work." After his appointment with the neurosurgeon, plaintiff continued to suffer debilitating back and leg pain and other symptoms, including recurring partial paralysis.

On August 7, 2007, at an appointment with Dr. Sumnicht at the Waupun Correctional Institution, plaintiff told the doctor that his pain was excruciating and that he wanted to have the surgery. A few days later, plaintiff sent a request to the Waupun Correctional Institution health services unit asking to be sent for back surgery.

On August 18, 2007, plaintiff filed a grievance in which he said that the Waupun Correctional Institution and the Department of Corrections refused to send him for surgery and made him suffer, that defendant Larsen had failed to see him for six months and that the reason plaintiff had been given for "re-assessing Phillips for possible surgery," was unjustifiable.

Plaintiff had another appointment on September 19, 2007 at UW Hospital in Madison during which he received a second opinion about the surgery. Plaintiff requested a third opinion, which he received after he was transferred to the Kettle Moraine Correctional Institution in October 2007. Plaintiff was sent to the Dodge Correctional Institution to get the third opinion from Dr. O'Brien, an orthopedic specialist. Plaintiff told O'Brien that he wanted the surgery.

Plaintiff also informed defendants doctor Elsa Horn and William McCreedy that he

wanted the surgery when he met with them at the Kettle Moraine Correctional Institution on November 26, 2007. Defendant Horn wrote in her notes that plaintiff's surgery should be scheduled. Defendant Horn's physician's orders indicated that she made a second request for the surgery on January 29, 2008, and that she instructed Susan March to make a call to neurosurgery on March 4, 2008. Susan March made calls on January 3, 2008 and February 1, 2008 regarding plaintiff's surgery date.

On March 4, 2008, plaintiff went to UW Hospital in Madison and had an appointment with a nurse. The nurse told plaintiff that his pre-operative appointment would be scheduled in 4-8 weeks and that the surgery would be scheduled 4-8 weeks after the pre-operative appointment.

Plaintiff wrote a letter to defendant McCreedy on March 25, 2008, telling McCreedy about his pain. Defendant McCreedy replied and informed plaintiff that he had been scheduled for surgery and that the institution was waiting to hear from the hospital about plaintiff's scheduled appointment. Plaintiff's attorney also wrote to McCreedy at some point to complain about the medical care plaintiff received surrounding the surgery. Plaintiff filed a complaint against McCreedy.

On May 3, 2008, defendant Sergeant Lehman refused to give plaintiff his pain medication at the appropriate time. Plaintiff was in pain from 7:10 a.m. until late that night.

While housed at the Waupun Correctional Institution and the Kettle Moraine Correctional Institution, plaintiff filed grievances about his inability to obtain appointments

with defendant Larsen, delays in scheduling surgery and his ongoing pain. The Bureau of Health Services, where defendants James Greer and David Burnett work, addressed plaintiff's grievances, but plaintiff still had ongoing pain and symptoms and his surgery was not scheduled or performed.

DISCUSSION

The Eighth Amendment to the United States Constitution requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To prevail ultimately on a claim under the Eighth Amendment, a prisoner must prove that prison officials engaged in "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106.

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584 -85 (7th Cir. 2006). The condition does not have to be life-threatening. Id. A medical need may be serious if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or it otherwise subjects the detainee to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). A delay in treatment can constitute harm under the Eighth Amendment if it causes "needless suffering." Williams v. Liefer, 491 F.3d 710, 715 (7th Cir. 2007) (quoting Gil v. Reed, 381 F.3d 649, 662 (7th Cir. 2004)). "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).

Thus, under this standard, plaintiff's claim is analyzed in three parts:

(1) Whether plaintiff had a serious health care need;

(2) Whether defendants knew that plaintiff needed care; and

(3) Whether, despite their awareness of the need, defendants failed to take reasonable measures to provide the necessary care.

Plaintiff alleges that he suffers from severe pain in his back and legs that limits his ability to walk more than 20-30 yards and when he does walk, he is often hunched over to try to limit his pain. In addition, he alleges that he experiences numbness and periodic paralysis, sleeplessness and loss of control of his bowels as a result of his condition. His pain was diagnosed by several physicians; he was prescribed several pain medications and surgery was recommended. From these allegations, it is possible to infer that plaintiff's back pain constitutes a serious medical need.

The next question is whether it is possible to infer that any of the named defendants were deliberately indifferent to plaintiff's need for care.

A. Defendants Horn and McCreedy

Plaintiff contends that defendants Horn and McCreedy were deliberately indifferent to his medical needs because they failed to make sure that plaintiff's back surgery was scheduled and performed. Defendant Horn is a doctor at Kettle Moraine Correctional

Institution; defendant McCreedy is health services unit manager at the institution. Both defendants were aware that plaintiff had a serious medical need. After plaintiff told defendants that he wanted the surgery during their meeting on November 26, 2007, both defendants addressed the scheduling of plaintiff's surgery. According to plaintiff's allegations, Horn took action on three occasions to schedule plaintiff's surgery and McCreedy responded to plaintiff's letter regarding the surgery and indicated that the surgery had been scheduled. This is evidence that they were aware of plaintiff's need for care and responded to it by insuring he received the treatment he requested. For these reasons, it is not possible to infer that defendants were deliberately indifferent to plaintiff's need for medical care; rather, his allegations indicate that they acted reasonably to address plaintiff's need for surgery. Therefore, plaintiff's claims will be dismissed with respect to defendants Horn and McCreedy.

B. Defendants Larsen and Schrubbe

Next, plaintiff alleges that defendants Larsen and Schrubbe were deliberately indifferent to his treatment for back pain because they gave him medication that did not alleviate his pain, would not alter the medications even though they knew they were ineffective and because they refused to send him for a neurological consultation. In addition, plaintiff was unable to obtain appointments with defendant Larsen after July 6, 2006. Defendant Schrubbe and Larsen's alleged failure to address his ongoing pain after July 6, 2006, supports a claim of deliberate indifference. Plaintiff has alleged that they knew that

the more convenient, alternative treatment they prescribed was not working to alleviate his pain and that he was in severe pain as a result.

Next, defendants' responsibility for plaintiff's difficulty scheduling appointments with defendant Larsen is unclear from plaintiff's allegation, but he does state that Larsen was aware of his ongoing pain as early as March 31, 2006, and both defendants were aware that plaintiff continued to suffer pain after the July 6, 2006 appointment. According to the complaint, after July 6, 2006, plaintiff was unable to obtain an appointment with Larsen or other treatment options despite instructions from defendant Schrubbe that he should address the effectiveness of the new treatment at a follow-up appointment with the doctor; after plaintiff complained of pain and requested a referral on July 6, Larsen dismissed him from his office and told him to make another appointment. If Schrubbe and Larsen were responsible for plaintiff's inability to get an appointment with Larsen, it is possible to infer that they did not reasonably address plaintiff's complaints of ongoing pain. For these reasons, plaintiff will be allowed to proceed on his claims against these defendants.

Finally, plaintiff should be aware that in order to prevail on his claim he will need to show not just that defendants were negligent in their treatment of his back (or in arranging his appointments) or that plaintiff disagreed with the treatment options they offered. He will need to show that defendants were aware that their failure to treat plaintiff's back posed a significant risk to his health or caused him unnecessary pain and that they disregarded the risk.

C. Defendants Sergeant Lehman, Greer and Burnett

Plaintiff alleges few facts about his interaction with defendant Lehman. Plaintiff alleges that on one occasion, defendant Sergeant Lehman refused to provide plaintiff with prescribed pain medication at the appropriate time and plaintiff suffered pain from approximately 7:00 a.m. until late that night. It is not clear from plaintiff's allegations what Lehman knew about plaintiff's medical needs or the medication he may have been responsible for dispensing to plaintiff.

Plaintiff's allegations about defendants Greer and Burnett are also sketchy at best. Plaintiff alleges that defendants Greer and Burnett failed to provide him with adequate medical care because in their employment at the Bureau of Health Services, they addressed his grievances about delays in obtaining surgery and the lack of pain medication and care he was receiving for his back, but they did not make sure that his surgery was performed.

From these limited facts it is not possible to decide whether plaintiff states a claim against any of these defendants. The court of appeals has held that district courts may require additional specificity from parties in situations like this, where the court is reviewing the complaint and the facts are unclear. Hoskins v. Poelstra, 320 F.3d 761, 764 (7th Cir. 2003). Because it would not be fair to the parties to either dismiss plaintiff's claims or allow plaintiff to proceed on them in the face of such vague allegations, I will direct plaintiff to supplement his allegations about defendants Lehman, Greer and Burnett. I will give plaintiff until August 13, 2008, in which to file an addendum to his complaint that includes allegations with regard to defendants Lehman, Greer and Burnett. Plaintiff may submit a

supplemental complaint in which he answers the following questions.

1) On May 3, 2008, how many times, if any, did plaintiff request pain medication from defendant Lehman and what, if anything, did Lehman say or do in response?

2) What, if anything, did plaintiff tell defendant Lehman about his pain or other symptoms and what, if anything, did Lehman say or do in response?

3) Prior to May 3, 2008, what, if anything, did defendant Lehman know about plaintiff's need for pain medication and other symptoms?

4) Which, if any, grievances or complaints did plaintiff address to Greer, what did they say and what, if any, responses did plaintiff receive from Greer?

5) Which, if any, grievances or complaints did plaintiff address to Burnett, what did they say and what, if any, responses did plaintiff receive from Burnett?

If by August 13, 2008, plaintiff does not file an addendum, I will assume that he does not wish to proceed with his Eighth Amendment claims against defendants Lehman, Greer and Burnett and I will dismiss his claims as to those defendants.

ORDER

IT IS ORDERED that:

1. Plaintiff Andrew Phillips is GRANTED leave to proceed on his claim that defendants Dr. Charles Larsen and Belinda Schrubbe did not adequately address his need for treatment for his ongoing back pain.

2. The decision whether to grant plaintiff leave to proceed is STAYED with respect to his claims that defendants Lehman, Greer and Burnett violated his Eighth Amendment rights. Plaintiff may have until August 13, 2008, in which to file an addendum to his complaint that includes allegations describing: 1) on May 3, 2008, how many times, if any, plaintiff requested pain medication from defendant Lehman and what, if anything, Lehman said or did in response; 2) what, if anything, plaintiff told defendant Lehman about his pain or other symptoms and what, if anything, Lehman said or did in response; 3) prior to May 3, 2008, what, if anything, defendant Lehman knew about plaintiff's need for pain medication and other symptoms; 4) which, if any, grievances or complaints plaintiff addressed to Greer, what they said and what, if any, responses plaintiff received from Greer; and 5) which, if any, grievances or complaints plaintiff addressed to Burnett, what they said and what, if any, responses plaintiff received from Burnett. If by August 13, 2008, plaintiff does not file an addendum with the court, I will assume that plaintiff does not wish to pursue his claims against those defendants and I will dismiss them from the case.

3. Once plaintiff has filed his addendum, I will determine whether he should be granted leave to proceed on his claims against defendants Lehman, Greer and Burnett. If he is granted leave to proceed, his complaint and any addendum will be sent to the Attorney General's office in accordance with an informal service agreement.

4. Plaintiff's claims that defendants Dr. Elsa Horn and William McCreedy were deliberately indifferent to his serious medical need are DISMISSED for plaintiff's failure to state a claim upon which relief may be granted.

5. Defendants Horn and McCreedy are DISMISSED from this case.

6. A strike will be recorded against plaintiff pursuant to 28 U.S.C. § 1915(g).

Entered this 30th day of July, 2008.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ANDREW PHILLIPS,

ORDER

Plaintiff,

08-cv-0362-bbc

v.

DR. CHARLES LARSON[1], BELINDA SCHRUBBE, JAMES GREER, DR. DAVID BURNETT, SERGEANT LEHMAN,

Defendants.

- -

In an order dated July 30, 2008, I screened plaintiff's complaint pursuant to 28 U.S.C. § 1915A. I concluded that plaintiff could proceed against defendants Larson and Schrubbe on his claim that these defendants were deliberately indifferent to his serious medical needs. However, I dismissed plaintiff's claims against defendants Elsa Horn and William McCreedy, because his allegations revealed that these defendants took affirmative

[1] In plaintiff's supplemental complaint, plaintiff points out that defendant Dr. Charles Larson was incorrectly identified in his original complaint as "Dr. Charles Larsen." The proper spelling of defendant Larson's name has been noted in the caption of this order.

action to address his medical needs and therefore, no inference could be drawn that they violated his Eighth Amendment rights. Unfortunately, plaintiff's bringing of a legally meritless claim against Horn and McCreedy earned him a strike under 28 U.S.C. § 1915(g), which was recorded in the July 30 order. With respect to defendants Lehman, Greer and Burnett, I stayed a decision whether plaintiff could proceed against them because his allegations were too sparse to allow a determination to be made whether they were deliberately indifferent to his need for pain medication. I asked plaintiff to supplement his complaint to provide more details about his interactions with these individuals.

Now, plaintiff has filed a document dated August 6, 2008 titled "Supplemental Complaint Pursuant to Judge Crabb's July 30, 2008 Opinion and Order," and a document dated August 13, 2008 titled "Motion for Reconsideration for Dismissing Defendants McCreedy and Horn and for Imposing a Strike for Their Dismissal."

Beginning with the motion for reconsideration, I conclude that plaintiff has provided no new factual information or legal authority suggesting why it was legal error to dismiss McCreedy and Horn from this lawsuit. Moreover, plaintiff's argument is unavailing that he should not have received a strike because he paid the filing fee when he submitted his complaint and, therefore, is not subject to § 1915(g). 28 U.S.C. § 1915A requires district courts to screen a prisoner's complaint "regardless of the prisoner litigant's fee status." Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999). Section 1915A(b) directs district courts to dismiss the complaint or any portion of it that is frivolous or malicious or fails to state a claim upon which relief may be granted. Section 1915(g) requires a strike to be recorded

whenever a prisoner brings an action or appeal that is dismissed on these grounds. It does not distinguish between paying and non-paying prisoners. Therefore, it was not error to impose a strike against plaintiff when I dismissed his claims against McCreedy and Horn for his failure to state a claim upon which relief may be granted. Because plaintiff's motion for reconsideration fails to present any argument meriting alteration of the July 30 order, the motion will be denied.

I turn then to plaintiff's "Supplemental Complaint Pursuant to Judge Crabb's July 30, 2008 Opinion and Order." As an initial matter, I note that plaintiff has asked to dismiss voluntarily defendants James Greer and David Burnett. Pursuant to Fed. R. Civ. P. 41(a), at this early stage of the proceedings plaintiff is free to withdraw his claims against any of the defendants without prejudice to his refiling his claims at a later time. Therefore, defendants Greer and Burnett will be dismissed from this lawsuit.

Plaintiff does wish to pursue his claim against defendant Lehman, however. In response to the court's invitation, he has supplemented his complaint with the following allegations of fact:

> On May 3, 2008, defendant Sergeant Lehman deliberately refused to give plaintiff his pain medication despite the fact that plaintiff requested it at the proper time and in the proper place. Lehman knew about plaintiffs pain and need for medication because he had dispensed the medication to plaintiff on previous occasions and had observed plaintiff limping or bent over in pain when plaintiff came for his medication. In addition, defendant was aware of plaintiff's medical condition because on a number of previous occasions Lehman had made phone calls requesting rides for the plaintiff to get around the prison. These rides were only authorized for prisoners with serious medical problems.

These allegations are sufficient to allow an inference to be drawn that defendant Lehman was

aware of plaintiff's need for pain medication and that he deprived plaintiff of it without regard for the additional pain plaintiff would endure. Therefore, plaintiff will be allowed to proceed on his claim that defendant Lehman deprived him of his Eighth Amendment rights.

Two additional matters require attention. First, although the July 30 order did not fully determine against which defendants plaintiff would be proceeding, the clerk forwarded plaintiff's complaint, without the supplement required by the order, to the Attorney General for informal service of process on all of the defendants except defendants Horn and McCreedy, who had been dismissed. Pursuant to the informal service agreement, the Attorney General has now advised the court that it has accepted service on behalf of defendants Lehman, Larsen, Schrubbe, Greer and Burnett. Nevertheless, because the complaint that was forwarded to the Attorney General was incomplete and thus did not constitute the operative pleading in this action, I am requesting that the complaint, as supplemented by plaintiff's "Supplemental Complaint Pursuant to Judge Crabb's July 30, 2008 Opinion and Order" (Dkt. #4), together with a copy of the July 30 order and this order, be forwarded to the office of the Attorney General pursuant to the informal service agreement so that when defendants file their answer, they may respond to the complete complaint.

Second, on August 11, 2008, plaintiff filed a motion to stay this case on the belief that he had been scheduled for surgery that would render him unable to continue to prosecute this lawsuit for at least 120 days. See Dkt. #5. Subsequently, on August 12, 2008, plaintiff asked the court to ignore the motion because he had discovered that he would

not be scheduled for surgery. Therefore, plaintiff's motion to stay the case will be denied as moot.

ORDER

IT IS ORDERED that:

1. Plaintiff Andrew Phillips is GRANTED leave to proceed on his claim that defendant Sergeant Lehman was deliberately indifferent to his serious medical needs when he denied plaintiff his pain medication on May 3, 2008. Plaintiff's complaint as supplemented by Dkt. #4 will be sent to the Attorney General's office, together with a copy of this order and the order of July 30, 2008, in accordance with an informal service agreement between this court and the Attorney General's office.

2. Plaintiff's request to dismiss voluntarily defendants James Greer and David Burnett from this lawsuit is GRANTED and these defendants are DISMISSED without prejudice.

3. Plaintiff's motion to stay this action (Dkt. #5) is DENIED as moot.

4. Plaintiff's "Motion for Reconsideration for Dismissing Defendants McCreedy and Horn and for Imposing a Strike for their Dismissal" (Dkt. #9) is DENIED.

Entered this 27th day of August, 2008.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge