

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

DIEGO GIL,

Plaintiff,

v.

JAMES REED, JAIME PENAFLORE and
UNITED STATES OF AMERICA,

Defendants.

ORDER

00-C-724-C

In an order entered December 21, 2000, I granted plaintiff Diego Gil leave to proceed in forma pauperis on claims under the Federal Tort Claims Act against respondent United States of America and under the Eighth Amendment against respondents James Reed and Jaime Penaflor. Plaintiff, who is confined in the Federal Correctional Institution in Oxford, Wisconsin, alleges that defendant United States of America negligently breached a duty of care to provide him with adequate medical care and that defendants Reed and Penaflor were deliberately indifferent to plaintiff's serious medical needs.

Plaintiff has filed a proposed amended complaint in which he makes additional allegations about defendant Reed and attempts to add a new defendant. Plaintiff will not

be allowed to amend his complaint because his proposed amended complaint does not state any new claims upon which relief may be granted.

The Prisoner Litigation Reform Act requires the court to screen inmate complaints, identify the claims and dismiss any claim that is frivolous, malicious or is not a claim upon which relief may be granted. See 28 U.S.C. §§ 1915A(a), (b). The screening obligation applies at all stages of the lawsuit and is not limited by the presence or absence of appointed counsel. For this reason, the failure to state a claim standard will control the analysis of plaintiff's motion. The majority of facts in the proposed amended complaint are the same as in plaintiff's original complaint and are described in the June 9 order. Plaintiff's new allegations are set forth below.

ALLEGATIONS OF FACT

A. Respondent Kedrow

Respondent James Kedrow is a physician assistant who is employed by the Federal Bureau of Prisons and assigned to the Federal Correctional Institution at Oxford, Wisconsin.

On Friday, March 20, 1998, plaintiff asked the unit officer to call the medical staff for an emergency sick-call because he was still experiencing severe pain and could barely walk. Plaintiff had recently had a rectal prolapse operation. Plaintiff saw respondent Kedrow and told him of his worsening condition, pain and inability to sleep or rest.

Respondent Kedrow gave petitioner a brochure on back exercises and told him to begin doing the exercises immediately. Respondent Kedrow noted on petitioner's medical records that he had "no urgent back pain" and that his request for medical assistance was a "misuse of emergency care." On Monday, March 23, 1998, medical staff determined that the incision from plaintiff's operation was infected.

B. Defendant Reed

On or about June 15, 1999, at approximately 11:30 a.m., plaintiff approached defendant Reed in the dining hall and asked Reed whether he wanted plaintiff to sign up for sick-call to discuss plaintiff's consultation with an outside surgeon on June 14 and whether plaintiff could be given a medical pillow so that he would be able to sit more comfortably. Defendant Reed asked who plaintiff was; when Reed learned plaintiff's name, he became hostile. Defendant Reed shouted at plaintiff, complaining that plaintiff was the individual who had sued him and asking how plaintiff could now come to him with questions. Defendant Reed told plaintiff that he was upset with what plaintiff was doing and that he had been served with a complaint the day before. Plaintiff asked defendant Reed to understand that he had suffered great pain and discomfort for many years, only to find out that his medical problem had been misdiagnosed and that even after a major corrective operation, the rectal prolapse problem was not fixed and he needed a second operation.

Plaintiff told defendant Reed that all he wanted to discuss was the medical consultation, not the lawsuit. Defendant Reed told plaintiff that plaintiff could talk to him in court. Plaintiff again asked defendant Reed if he should sign up for sick-call to discuss the consultation and ask for a medical pillow. Defendant Reed said that would be correct.

On or about September 14, 1999, defendant Reed placed plaintiff on medical call-out for an appointment at 7:30 a.m. Plaintiff arrived at the hospital at 7:30 a.m. but was forced to wait about six and a half hours, until 2:55 p.m. Defendant Reed knew that plaintiff's medical problem made sitting uncomfortable. Finally, defendant Reed called plaintiff into his office; Reed ranted about plaintiff's lawsuit instead of discussing plaintiff's medical problems. Defendant Reed told plaintiff that plaintiff should not expect to come for medical assistance after filing a lawsuit against Reed. Plaintiff told defendant Reed that he had not asked for a sick-call to see Reed, but that Reed had placed plaintiff on call-out. Plaintiff also told defendant Reed that he did not want to talk about the lawsuit.

DISCUSSION

Plaintiff contends that respondent Kedrow and defendant Reed were deliberately indifferent to his serious medical need. Plaintiff contends that defendant Reed violated the Eighth Amendment by forcing him to wait six and a half hours on September 14, 1999, when Reed knew that plaintiff's medical condition causes him severe pain if he sits for long

periods of time. Plaintiff has already been granted leave to proceed in forma pauperis on an Eighth Amendment claim of inadequate medical treatment against defendant Reed. It is not necessary for plaintiff to amend his complaint to bolster his allegations against defendant Reed. Plaintiff may adduce additional relevant information on summary judgment or at trial and is not limited to the allegations contained in his original complaint.

To state a claim of inadequate medical care under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). In the December 21, 2000 order, I determined that plaintiff had alleged adequately that he suffered from a serious medical need. The Supreme Court has held that deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. See Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Plaintiff contends that respondent Kedrow caused him great pain by dismissing his medical complaints, misdiagnosing his surgical infection as a back problem that required exercise and noting in his medical file that he was abusing the emergency care procedures. Plaintiff's allegations do not suggest that respondent Kedrow knew that plaintiff's surgical incision was infected and deliberately misdiagnosed the infection as a back problem; instead, plaintiff alleges that respondent Kedrow gave him a brochure on back exercises in an attempt to ease plaintiff's back pain. At most, plaintiff's allegations suggest that respondent Kedrow was negligent in responding to plaintiff's complaints of pain. Plaintiff has already been granted leave to proceed in forma pauperis against defendant United States of America on his claim that defendant's employees were negligent in the medical care they provided to plaintiff. Plaintiff will not be allowed to amend his complaint to add an Eighth Amendment claim against respondent Kedrow because he has failed to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that plaintiff Diego Gil's motion to amend his complaint is

DENIED.

Entered this 23rd day of May, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge