IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STANTON T. WILLIS,

Petitioner, ORDER

v. 01-C-500-C

JACKSON CORRECTIONAL INSTITUTION;
PHIL KINGSTON, Warden, J.C.I.;
JUDY NORDAHL, HSU Manager, J.C.I.;
HSU STAFF, ET AL.; and
CPT. TEGELS, J.C.I.,

Respondents.

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This is a civil action for monetary and declaratory relief brought pursuant to 42 U.S.C. § 1983. Petitioner, who is currently an inmate at the Jackson Correctional Institution in Black River Falls, Wisconsin, alleges that respondents violated the Eighth Amendment by failing to provide him with adequate medical treatment. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal

merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, 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. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

I will deny petitioner's leave to proceed on his Eighth Amendment claim because he failed to state a claim upon which relief may be granted.

In his complaint and attachments, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner is an inmate at the Jackson Correctional Institution in Black River Falls, Wisconsin. Respondent Jackson Correctional Institution is a penal facility. Respondent Phil Kingston is the warden of the Jackson Correctional Institution. Respondent Judy Nordahl is a registered nurse and manager of the Health Services Unit at the Jackson Correctional Institution. Respondent HSU Staff is all the nursing personnel on staff at the Health

Services Unit during the events described. Respondent Tegels is captain of the Jackson Correctional Institution.

All of the following events occurred in the year 2000.

On January 5, petitioner requested that the Health Services Unit at the Jackson Correctional Institution send him to the University of Wisconsin-Madison Hospital to have a lump removed from his inner left thigh/testicle because he was in severe pain. In that same request, petitioner noted that the Health Services Unit had been treating this lump for over one year. Respondent Nordahl responded by stating that "the physician will determine if/when it is appropriate to refer [petitioner] to a specialist in Madison." On January 6, petitioner reiterated his January 5 request directly to respondent Nordahl. Respondent Nordahl referred petitioner to her response to his January 5 request. On January 12, in response to another request by petitioner, the Health Services Unit indicated that the Jackson Correctional Institution physician had requested permission for a dermatologist at UW Hospital to evaluate petitioner's lump.

On February 14, petitioner was seen by a dermatologist at UW Hospital in Madison. The doctor's notes state that "best tx is excision – would send to gen. surg. [with] next episode of inflam. to excise EIC." The doctor also indicated that "as far as Abx prophylaxis – Dicloxacilin may be more effective than Doxycycline."

On June 1, petitioner informed the Health Services Unit that the lump on his left

inner thigh/testicle had "come back" and that he was to be scheduled for surgery on the next inflamation. Petitioner was seen the same day, given a water bottle to apply warm compresses and was scheduled to see a physician on June 6. On June 5, petitioner reported the area "broke open and is draining." On June 6, petitioner was seen by a Jackson Correctional Institution physician, who noted that the area was infected and ordered antibiotics.

Petitioner submitted an "information request" inquiring whether surgery had been approved. On June 9, respondent Nordahl replied that no surgery had been scheduled because petitioner had been seen by the Jackson Correctional Institution physician on June 6, and the physician had ordered antibiotics. Respondent Nordahl also stated that "the orders written by U.W. physicians are considered 'recommendations' until validated by a DOC physician, [petitioner] should continue [his] antibiotics and showers and return to the Health Services Unit in 60 days as ordered by the physician."

On June 26 and July 9, petitioner had recurrences of this problem. Petitioner was treated by the Health Services Unit on July 10, 15, 17, 20 and 28 and August 6, 7 and 8 for his left thigh/testicle lump.

On or about August 29, petitioner had surgery for the lump.

On August 29 and 30 and September 4, 5, 7, 9, 12 and 14, petitioner was seen by the Health Services Unit staff to, among other things, monitor his wound, change the dressing

and administer sitz baths for his left thigh/testicle lump. On September 15, petitioner was concerned that the surgical site might be infected. A physician evaluated the area and determined that the "lesion is healing well." Petitioner was treated by the Health Services Unit on September 15, 23, 26 and 28 and October 10 and 19 for his left/thigh testicle lump.

On October 25, respondent Tegels would not allow plaintiff to go to the Health Services Unit for his sitz bath treatment. Petitioner filed an inmate complaint regarding the incident. In response, the complaint examiner advised petitioner that because the unit was in the process of a shakedown, respondent Tegels had had the unit officer call the Health Services Unit to ask whether petitioner's appointment was for an immediate medical situation and had been told it was not. As a result, petitioner had not been allowed to go to his appointment.

Subsequently, petitioner was treated for his left/thigh testicle lump by the Health Services Unit on October 26 (petitioner was also treated at UW Hospital on this date), 28, 30 and 31, November 1, 2, 3, 4, 5, 6, 7, 9, 13, 15, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28 and 30 and December 2, 3, 4, 6, 9 and 10.

OPINION

The Eighth Amendment 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 state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Therefore, petitioner must establish facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). See Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. See Gutierrez, 111 F.3d at 1371. 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. 824, 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); see also Snipes, 95 F.3d at 590-91; Franzen, 780 F.2d at 652-53. Deliberate indifference in the denial or delay of medical care is evidenced by a respondent'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).

The essential question in petitioner's claim is whether the medical treatment is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition," Snipes, 95 F. 3d at 592 (citations omitted), giving rise to a claim of deliberate indifference. See also Estelle, 429 U.S. at 104 (holding that deliberate indifference "is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed").

The facts that petitioner was treated for nearly a year and provided at least one surgical intervention are sufficient to establish that he has a serious medical condition under the Eighth Amendment. However, those same facts make it impossible for him to succeed on a claim that respondents were deliberately indifferent to his medical needs. Petitioner has been receiving antibiotics, pain medication, sitz bath treatments and medical examinations on a regular basis. In fact, petitioner's own complaint reveals that he has been treated for his medical condition a minimum of 59 times, with at least four visits to UW Hospital (an initial dermatologist visit, the surgery itself and two follow-up visits). Unquestionably, such medical care does not suggest deliberate indifference and is not blatantly inappropriate. On the contrary, petitioner received persistent medical care.

Furthermore, differences of opinion as to matters of medical judgment, negligent treatment or even medical malpractice are insufficient to state a claim under § 1983. See Kelley v. McGinnis, 899 F.2d 612, 616 (7th Cir.1990). Therefore, the fact that petitioner would have chosen a different course of treatment is not enough to sustain an Eighth Amendment claim for inadequate medical care. Petitioner faults respondent Tegels for not allowing petitioner to go to the Health Services Unit for a sitz bath treatment on October 25, 2000, but his own allegations reveal this was a one-time incident and did not involve an immediate medical need.

Because petitioner failed to state a claim upon which relief can be granted, I will deny leave to proceed on his Eighth Amendment claim of inadequate medical care.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED with prejudice for petitioner's failure to state claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is $138.03; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 17th day of September, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge