IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DEAN L. PAULSON,

Petitioner, OPINION AND ORDER

v. 01-C-585-C

SHERIFF ERIC A. RUNAAS and
his employees and agents,

Respondents.

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This is a civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Petitioner Dean L. Paulson, who is currently an inmate at Rock County Jail in Janesville, Wisconsin, alleges that respondents (1) violated his Eighth Amendment right to adequate medical care by improperly diagnosing his back pain; (2) violated the Solles v. Devine consent decree; and (3) were negligent when they put him in a cell that had water on the floor.

Petitioner seeks leave to proceed pursuant to 28 U.S.C. § 1915. Because petitioner had no means with which to pay an initial partial payment, he was required to advise this court in writing before November 14, 2001, whether he wished to withdraw his request for

leave to proceed or else be irrevocably obligated to pay the $150 filing fee, even if this court determines that he will not be permitted to proceed with his complaint in forma pauperis and even if petitioner does not presently have funds with which to pay the fee. Petitioner advised this court on November 9, 2001, that he wished to move forward on his request for leave to proceed in forma pauperis, and recognized that he is obligated to pay the $150 filing fee. Therefore, although petitioner has not made the initial partial payment required under § 1915(b)(1), he is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

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).

Because petitioner has failed to state a claim upon which relief may be granted, he will be denied leave to proceed on his Eighth Amendment claim. Because petitioner has failed to allege facts providing an arguable basis that the treatment he received violated the Solles consent decree, respondents are not in contempt of the decree. Because no federal claim remains, I will decline to exercise supplemental jurisdiction over his state law claims.

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

ALLEGATIONS OF FACT

Petitioner is an inmate at Rock County Jail in Janesville, Wisconsin. Respondent Eric A. Runaas is the sheriff of the Rock County Jail. Respondents "employees and agents" are those Rock County Jail personnel who were involved in petitioner's medical care and the incident surrounding his injury.

Petitioner suffers from degenerative disc disease, a permanent back ailment that had been treated in the past with steroid injections.

On July 18, 2001, Commanding Officer Danielson ordered petitioner into cell C-2-4, which was flooded with water on the floor. Petitioner requested a mop so that he could remove the water. This request was denied. At meal time, petitioner again requested a mop to clean up the water. This second request was also denied.

When petitioner was returning his meal tray, he slipped and fell on the wet floor and re-injured his back. Danielson witnessed the incident. Petitioner felt back pain immediately and asked Danielson to contact medical services to which Danielson agreed. In addition, petitioner filled out a medical services request form. The next day petitioner requested to be seen by medical services six times before he was able to talk with a nurse.

On August 8, 2001 petitioner was seen by a doctor who prescribed strengthening exercises and told petitioner to complete a request for pain medication, if needed.

On August 18, 2001, a medical services doctor evaluated petitioner and diagnosed his back pain and left-leg numbness as the result of a weak left leg. On September 24, 2001 a doctor prescribed Tylenol for pain. On September 27, 2001, a second doctor evaluated petitioner and diagnosed his pain and numbness as a result of the fact that he is overweight.

In addition, petitioner was seen by medical services personnel on September 12, October 4, 10 and 12.

Because petitioner has injured his back previously, he knows what is wrong with his back but the doctors at medical services refuse to treat it as he has instructed. As a result, he is in constant back pain and suffers left-leg numbness.

OPINION

A. Inadequate Medical Care

I understand petitioner to allege that respondents violated his Eighth Amendment rights by failing to provide adequate medical care for his back injury. 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). In 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 case is whether the medical treatment he received 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 fact that petitioner was treated numerous times over several months is sufficient to establish that he has a serious medical condition under the Eighth Amendment. However, these 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 pain medication

and medical examinations on a regular basis. In addition, he has been given instructions to strengthen his back in order to alleviate pain. Such medical care does not suggest deliberate indifference and is not blatantly inappropriate. Moreover, 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.

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.

B. Solles Consent Decree

Petitioner alleges that his treatment by jail officials violated the consent decree in Solles v. Devine, 73-C-143 (W.D. Wis. July. 5, 1978), amended in Solles v. Devine, 73-C-143 (W.D. Wis. Nov. 20, 1986). To challenge a violation of a consent decree, a plaintiff must seek an order of contempt. Martin v. Davies, 917 F.2d 336, 339 (7th Cir. 1990). Although petitioner has characterized and brought his action under § 1983 rather than as a petition for an order of contempt, in the interest of efficiency and in the spirit of liberal construction, I will construe his complaint as including a motion seeking an order of contempt.

Petitioner alleges that respondent violated his rights under the Solles consent decree. Section IV, paragraphs 9 and 12 of the amended decree provide, respectively, that jail officials make every effort to provide non-emergency medical treatment within 48 hours of an inmate's initial request and that officials provide immediate emergency room care at the local hospital for all medical emergencies.

Petitioner alleges that the day after his slip-and-fall accident he spoke with a nurse about his condition. As a result of this conversation, respondents provided medical care within 48 hours as required under the Solles consent decree. Petitioner also alleges that respondents did not reply to his further requests for medical attention. Under the terms of the decree, a failure to respond to each and every one of petitioner's similar requests for medical attention is not a violation. Finally, petitioner alleges that respondents violated the decree by not providing emergency room care at a local hospital. Although petitioner has alleged he suffers continual back pain, such an allegation does not rise to the level of a medical emergency that warrants immediate care at a local hospital.

Petitioner has failed to allege facts providing an arguable basis for his claim that the treatment he received violated the Solles consent decree. Therefore, respondents are not in contempt of the decree.

C. State Law Claims

I understand petitioner to allege that respondents were negligent by leaving water on the floor of his cell. Because petitioner will be denied leave to proceed on his Eighth Amendment claim, he has no viable federal law claim. I decline to exercise supplemental jurisdiction over his state law claim of negligence. 28 U.S.C. § 1367(c)(3)); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or refuse jurisdiction over state law claims).

ORDER

IT IS ORDERED that

1. Petitioner Dean L. Paulson's request for leave to proceed in forma pauperis on his Eighth Amendment inadequate medical care claim against respondents Eric A. Runaas and his employees and agents is DENIED for petitioner's failure to state claim upon which relief may be granted;

2. Respondents are not in contempt of the Solles v. Devine consent decree.

3. I decline to exercise of supplemental jurisdiction over plaintiff's state law claims.

4. The unpaid balance of petitioner's filing fee is $150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available;

5. A strike will not be recorded against petitioner because I declined to exercise

supplemental jurisdiction over state law claims and thus did not dismiss the action for one of the reasons set forth in 28 U.S.C. § 1915(g); and

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

Entered this 4th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge