IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LUIS A. NIEVES,

ORDER

Petitioner,

01-C-0597-C

v.

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS; Doctor JOHN DOE; RN JANE DOE; Radiologist JOHN DOE; SUPERMAX CORRECTIONAL INSTITUTION; Warden GERALD A. BERGE; PRISON HEALTH SERVICES INC.; Administrator HSU-SMCI PAMELA BARTELS; Dr. GERL HASSELHOFF, MD SMCI; Nurse Practitioner-SMCI ELIZABETH P. HINCKLEY,

Respondents.

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This is a proposed civil action for injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. 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. 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).

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

ALLEGATIONS OF FACT

Petitioner Luis Nieves is an inmate at the Supermax Correctional Institution in Boscobel, Wisconsin. Respondents are the University of Wisconsin Hospital and Clinics in

Madison, Wisconsin and an unnamed doctor, registered nurse and radiologist who work at the hospital; the Supermax Correctional Institution and its warden, Gerald A. Berge; Supermax health services administrator Pamela Bartels; Supermax employees Dr. Gerl Hasselhoff and nurse practitioner Elizabeth P. Hinkley; and Prison Health Services, Inc. of Brentwood, Tennessee.

On September 8, 2001, petitioner injured his wrist. Petitioner was taken to the University of Wisconsin Hospital emergency room in Madison, Wisconsin. At the hospital, an unnamed radiologist took X-rays of petitioner's wrist, told petitioner that his wrist was dislocated and that a doctor would review the X-rays. After 30 minutes, an unnamed doctor arrived to examine petitioner's wrist. The unnamed doctor removed the wrap that covered petitioner's wrist, examined the wrist, told petitioner the wrist was not broken and then left the room. After another 10 minutes, an unnamed registered nurse took petitioner's blood pressure. The nurse then told petitioner that the doctor had ordered petitioner's release so he could be returned to Supermax. Petitioner asked if the nurse or the doctor were going to do something about the dislocation the radiologist had mentioned. The nurse told petitioner that the doctor had prescribed Tylenol and the application of ice to the wrist and urged petitioner to keep the wrist elevated.

When petitioner returned to Supermax he was not given any further treatment. Petitioner asked to see the Supermax medical staff and after one week petitioner was seen

by respondent Hinkley. Petitioner asked respondent Hinkley to provide him with adequate medical care for his wrist but Hinkley told petitioner there was nothing she could do for him and advised petitioner to keep his arm elevated and iced. Two days later petitioner saw respondent Hasselhoff. Petitioner told respondent Hasselhoff about his visit to the University of Wisconsin Hospital. Respondent Hasselhoff told petitioner he would be "OK." Petitioner told respondent Hasselhoff to look at the bone that could be seen easily through petitioner's skin and was obviously out of place. Respondent Hasselhoff told petitioner that his wrist was just swollen. Petitioner then told respondent Hasselhoff in a loud voice that "you could feel the fucking bone and see it, that's not fucking right." Respondent Hasselhoff then told petitioner that a wrist bracelet had been ordered for him and would be sent to petitioner as soon as it arrived. In addition, respondent Hasselhoff asked petitioner whether his fingers hurt. Petitioner said they did. Respondent Hasselhoff then examined petitioner's fingers, telling petitioner that he was checking for blood circulation. After checking petitioner's fingers, respondent Hasselhoff again told petitioner he "was good," and sent him back to his cell. After his visit with respondent Hasselhoff petitioner complained. However, petitioner has been ignored by the Supermax medical staff and by respondents Berge and Bartels.

By October 11, 2001, petitioner had not received any relief from respondents. On October 11, more X-rays were taken of petitioner's wrist at Supermax. These X-rays clearly

showed a dislocation. Nevertheless, petitioner received no further treatment. Throughout the course of these events petitioner has only been provided ice once a week, Tylenol four times a day and a wrist bracelet that does not fit properly because it is too small. This treatment has done nothing to improve petitioner's injury or alleviate his extreme pain. Petitioner fears his arm will become disabled if left untreated.

OPINION

I understand petitioner to allege that respondents are violating his Eighth Amendment right to be free from cruel and unusual punishment by not providing him with adequate treatment for his wrist 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 allege facts from which it can be inferred that he had a serious medical need (objective component) and that respondent was deliberately indifferent to this need (subjective component). 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. Gutierrez, 111 F.3d at 1371. Petitioner alleges that his wrist is visibly dislocated and causes him extreme pain. For the purpose of deciding his claim, I will assume that petitioner's wrist injury constitutes a serious medical need. Thus, petitioner has alleged sufficient facts to meet the objective component of the Eighth Amendment requirement.

Even assuming that petitioner's wrist injury constitutes a serious medical need, petitioner's proposed complaint does not contain any evidence demonstrating that respondents exhibited deliberate indifference to petitioner's condition. The Supreme Court has held that the subjective component of 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). It is not enough that he "should have known" of the risk. Rather, the official must know there is a risk and consciously disregard it. Higgins v. Correctional Med. Servs. of Ill., 178 F.3d 508, 511 (7th Cir. 1999). Although deliberate indifference may be found where "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), inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). "[D]ifferences in opinion between the patient and the doctor [regarding medical treatment] never give rise to a constitutional claim." Higgins v. Correctional Medical Services of Ill., Inc., 8 F. Supp 2d. 821, 830 (N.D. Ill. 1998).

The facts petitioner alleges show that respondent was not deliberately indifferent toward him or his pain. Petitioner's complaint demonstrates that immediately upon being injured, he was taken from Supermax to the University of Wisconsin Hospital in Madison where his wrist was X-rayed, he was seen by a doctor and he was prescribed a course of treatment. Further, just over a week after his treatment at the University of Wisconsin Hospital petitioner was seen by a doctor at Supermax who checked his circulation and ordered him a wrist brace. Petitioner was also X-rayed a second time approximately a month after injuring his wrist and less than one week before filing the complaint presently before the court. According to his complaint, since injuring his wrist petitioner has received ice and Tylenol on a regular schedule. That petitioner disagrees with this course of treatment is irrelevant for Eighth Amendment purposes because petitioner's allegations show that the treatment petitioner is receiving is not so inadequate as to constitute deliberate indifference. Accordingly, petitioner's Eighth Amendment claim will be dismissed for his failure to state a claim upon which relief may be granted.

Petitioner's proposed complaint also alleges violations of the Wisconsin Constitution. Because petitioner will be denied leave to proceed on his Eighth Amendment deliberate indifference claim, he has no viable federal law claim. I decline to exercise supplemental jurisdiction over his state law claims. 28 U.S.C. § 1367(c)(3). Petitioner has also filed a motion requesting that counsel be appointed to assist him. This request will also be denied because the case will not be going forward in this court.

Finally, I note that petitioner's allegations do not appear to overlap with those in Jones 'El v. Berge, 00-C-421-C, slip op. at 29 (order entered August 14, 2001). In that pending case, I certified for class treatment a claim that the systemic inadequacies of the provision of medical, dental and mental health care at Supermax constitute deliberate indifference to serious medical needs in violation of the Eighth Amendment. Petitioner does not and cannot allege that he was denied prompt medical treatment because of insufficient staffing at Supermax. Indeed, petitioner's complaint indicates he was seen, X-rayed and treated at the University of Wisconsin Hospital immediately upon sustaining his wrist injury and again on multiple occasions by a doctor and medical staff at Supermax. Rather, petitioner disagrees with the course of treatment he has received for his wrist injury. Accordingly, petitioner's allegations are distinguishable from those at issue in the class action suit and do not need to be stayed pending at decision in that case.

ORDER

IT IS ORDERED that:

1. Petitioner 's request for leave to proceed in forma pauperis on his claims is DENIED and the action is DISMISSED with prejudice;

2. Petitioner's motion for appointment of counsel is DENIED;

3. The unpaid balance of petitioner's filing fee is $131.71; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because the state law claims do not fall under one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g); and

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

Entered this 11th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge