

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

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STEVEN A. CONWAY

Petitioner,

ORDER

v.

02-C-0025-C

JON LITSCHER and  
Unknown DOC Medical Staff,

Respondents.  
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This is a proposed civil action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Petitioner, who is currently an inmate at the Kenosha Correctional Center in Kenosha, Wisconsin, contends that respondents are violating his rights under the Eighth Amendment and state law by denying him medical treatment for hepatitis C. In addition, petitioner contends that respondents “possibly” retaliated against him for filing a complaint by administering a “painful” vaccination in violation of the First Amendment.

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, the prisoner’s complaint must be dismissed if, even under a liberal construction, it 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. See 42 U.S.C. § 1915e. 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 at this early stage of the proceedings petitioner has alleged facts sufficient to show that an unknown respondent was deliberately indifferent to a serious medical need, I will grant his request for leave to proceed in forma pauperis as to this claim against respondent Litscher for the sole purpose of discovering the name of the medical staff member who is allegedly responsible for denying him his hepatitis C treatment. Because petitioner has failed to state a claim upon which relief can be granted as to his retaliation and state law claims, I will deny his request for leave to proceed in forma pauperis as to these claims.

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

## ALLEGATIONS OF FACT

Petitioner is an inmate at Kenosha Correctional Center in Kenosha, Wisconsin. Respondent Jon Litscher is secretary of the Wisconsin Department of Corrections. Respondents "unknown medical staff" are the individuals responsible for denying petitioner's medical treatment and retaliating against him.

On January 28, February 16 and May 18, 2000, petitioner tested positive for Hepatitis C, a life threatening blood and liver disease. These tests also revealed elevated liver enzyme levels (ACT and AST), indicating his condition is worsening.

According to petitioner, the Physician's Desk Reference, New England Journal of Medicine and other medical data indicate the sooner treatment for hepatitis C begins, the better the chances that the disease will go into remission or for complete recovery.

On or about September 6, 2001, petitioner's ACT levels rose from 47 to 195. Dr. Hubbard, a University of Wisconsin physician, stated that a biopsy "may be needed." On this same date, petitioner informed Hubbard that vaccines for hepatitis A and B were needed because he was already infected with hepatitis C and that death could result if he contracted the A or B strains. Hubbard agreed and recommended the vaccines with treatment. Petitioner did not receive the treatment that Hubbard recommended. From petitioner's research, a biopsy will indicate whether a liver transplant is warranted.

Approximately two months later, petitioner wrote a letter of complaint to respondent

Litscher. Respondent Litscher sent petitioner's letter to Mickey Thompson, warden of the Wisconsin Minimum Centers. Thompson sent it to Superintendent Mahoney of the Kenosha Correctional Center. Mahoney showed it to an unnamed nurse at Kenosha.

At petitioner's first visit for his hepatitis B vaccine, the nurse told petitioner that she did not appreciate the letter he sent to the Department of Corrections and she gave him a painful shot "possibly in retaliation for exercising right to complaint; seek treatment."

On October 30, 2001, petitioner received the second of three vaccines for hepatitis B. An unnamed nurse at Kenosha Correctional Center completed a "Request for Authorization for Class III Surgery" on Hubbard's behalf, which stated that "Dr. Hubbard Recommends Treatment" in the "recommended procedure/test" category. The nurse also noted "unknown" in the "prognosis if not treated at this time" category.

Petitioner never received his third and final vaccine in December.

On November 19, 2001, a DOC medical staff member from the Bureau of Health Services denied Hubbard's request for treatment by stating that "offender does not qualify by guidelines for treatment as his mandatory release date (04/08/02) is less than 18 months." The signature of the staff member who signed the denial is illegible.

The Department of Corrections provides alcoholism treatment when an inmate has less than 18 months remaining until his mandatory release date.

## OPINION

### A. Deliberate Indifference

I understand petitioner to allege that respondents violated his Eighth Amendment rights by being deliberately indifferent to a serious medical need when respondents refused to biopsy petitioner's liver or provide him with his third and final hepatitis B vaccine. (It is difficult to discern from petitioner's complaint whether the "treatment" that petitioner alleges that he was denied was the biopsy, the third vaccine of hepatitis B or the course of hepatitis A vaccines. Because the form that Hubbard completed was a request for "surgery," it is logical to conclude that Hubbard's request refers to the biopsy rather than any vaccines. Moreover, petitioner alleges that he was denied only his third vaccine of hepatitis B; there are no allegations as to denials of hepatitis A vaccines.)

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, 1373. (“‘serious’ medical need is one that has been diagnosed by a physician as mandating treatment”). Petitioner alleges that he has hepatitis C, a life threatening disease, and that Hubbard recommended treatment. Moreover, petitioner states that his liver enzyme levels are elevated, indicating his condition is worsening. Therefore, petitioner’s allegations indicate that he has 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. 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 can be shown by a respondent’s actual intent or reckless disregard. Reckless disregard is 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 question is whether the denial of 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, 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”). In this case, petitioner was denied the recommended biopsy because petitioner was within 18 months of his mandatory release date. At this early stage of the proceedings, allegedly denying petitioner’s hepatitis C treatment on the sole basis that petitioner will be released within 18 months is sufficient to show deliberate indifference.

The signature of the physician who denied petitioner’s request for the “Class III surgery” is illegible. Therefore, because petitioner’s allegations are sufficient to support an inference that a prison official was deliberately indifferent to his medical needs in violation of the Eighth Amendment, I will allow him to proceed on this claim against respondent Litscher for the sole purpose of discovering the name of the prison official who is allegedly responsible. See Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981). Once petitioner learns the name of the person directly responsible for denying him his treatment,

he will have to amend his complaint to name that individual as a respondent in place of respondent Litscher. If petitioner fails to disclose the name of the respondent to be added and amend his complaint within 90 days of the date of this order, he may face dismissal of his complaint for failure to prosecute.

### B. Retaliation

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To state a claim in the absence of direct evidence of retaliation, the prisoner must allege a chronology of events that supports drawing an inference that the official acted in retaliation, see Black v. Lane, 22 F. 3d 1395, 1399 (7th Cir. 1994). The allegations must show that absent a retaliatory motive, the prison official would have acted differently. See Babcock, 102 F.3d at 275.

Petitioner's claim fails for two reasons. First, petitioner's cause of action is for declaratory and injunctive relief only, not monetary damages. Second, even if petitioner had sued for monetary damages he still would have failed to state a claim upon which relief can be granted. Petitioner alleges that an unknown nurse administered a vaccination painfully because he filed a complaint regarding treatment for hepatitis C. Ironically, part of petitioner's requested treatment involves receiving vaccines for hepatitis B, which the nurse



provided. Although petitioner claims that the nurse reprimanded him for filing a complaint prior to administering the vaccine, he offers no allegations that absent her alleged retaliatory motive the vaccination would have not been painful. Simply put, it is a truism that vaccinations are painful. Because these allegations are not enough to support a claim of retaliation, I will deny petitioner's request for leave to proceed in forma pauperis as to his retaliation claim.

### C. State Law Claims

Petitioner alleges that respondents violated several Wisconsin laws that are irrelevant to his allegations of deliberate indifference as to his hepatitis C condition (or, for that matter, to his allegation of retaliation). For example, petitioner cites Wis. Stat. § 51.45, "Prevention and control of alcoholism," and § 940.29, "Abuse of residents of penal facilities." Petitioner's first cited provision does not pertain to his allegations of denial of medical treatment and the second is a criminal violation, not civil. Because petitioner's state law claims are not relevant to his allegations, I will retain jurisdiction and deny petitioner's leave to proceed in forma pauperis as to these claims. See 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 Steven A. Conway's request for leave to proceed in forma pauperis on his Eighth Amendment claim of denying hepatitis C treatment against respondent Jon Litcher is GRANTED for the sole purpose of discovering the name of the medical staff member who is allegedly responsible. Once petitioner learns the name of the person directly responsible for denying him his hepatitis C treatment, he will have to amend his complaint to name that individual as a respondent in place of respondent Litscher;

2. Petitioner's request for leave to proceed in forma pauperis on his retaliation and state law claims are DENIED as legally frivolous;

3. The unpaid balance of petitioner's filing fee is \$48.48; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. Petitioner should be aware of the requirement that he send respondent a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondent, he should serve the lawyers directly rather than respondent. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical

handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondent or to respondent's lawyers.

Entered this 6th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge