

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

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TAURUS R. MERCHANT,

Petitioner,

ORDER

v.

02-C-0537-C

JON LITSCHER, GERALD BERGE,  
and CINDY SAWINSKI,

Respondents.  
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This is a proposed civil action for monetary and declaratory relief brought pursuant to 42 U.S.C. § 1983. Petitioner Taurus R. Merchant, who is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, alleges that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment because respondent Sawinski, a registered nurse, prescribed antibiotic ointment rather than antifungal cream for the ring worm on his legs.

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.

Because petitioner's claim is legally frivolous, he will be denied leave to proceed in forma pauperis. Because I will not be granting leave to proceed, petitioner's request for appointment of counsel will be denied as moot.

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

#### ALLEGATIONS OF FACT

Petitioner is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondents Jon Litscher, Gerald Berge and Cindy Sawinski are employees of the Department of Corrections.

On June 25, 2002, petitioner noticed dime-sized, ring-shaped sores on his legs. That same day, petitioner requested to see a physician and was told that he would be placed on a waiting list.

On June 26, 2002, respondent Sawinski, a registered nurse, examined petitioner's legs. Respondent Sawinski stated that "the sores look like burns" and prescribed triple antibiotic ointment to be used for 14 days. Petitioner followed respondent Sawinski's instructions and used the ointment twice a day. Fourteen days later, petitioner filed another

health services request form, stating that the sores had grown in size and had spread. Respondent Sawinski had no authority to prescribe ointment, which, in the end, caused petitioner's sores to get bigger, more irritated and caused him excruciating pain for almost two weeks.

On July 17, 2002, petitioner saw a physician who diagnosed his condition as ring worm and prescribed an antifungal cream.

On September 1, 2002, petitioner filed another health services request form, stating that the "spots that appear to be (ring worms) that are showing up again, only now in a different spot of [his] leg."

## DISCUSSION

Petitioner alleges that he has been subjected to a violation of "human rights under the convention against torture" and that he has suffered cruel and unusual punishment because of inadequate medical treatment for his ring worm condition.

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 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 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, giving rise to a claim of deliberate indifference. See 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 treatment was not so blatantly inappropriate as to evidence intentional mistreatment for his leg sores. On the contrary, petitioner was treated promptly. The fact that respondent Sawinski prescribed antibiotic ointment rather than antifungal cream does not rise to the level of deliberate indifference necessary to maintain a claim under the Eighth Amendment. It is not enough to assert facts that, if true, would constitute poor or negligent medical care. Such assertions might make out a state law tort claim for medical malpractice, but they do not support a claim that petitioner’s rights under the Eighth Amendment have been violated. See Estelle, 429 U. S. at 106 (“Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”). Because petitioner’s claim is legally frivolous, I will deny his request for leave to proceed in forma pauperis.

ORDER

IT IS ORDERED that

1. Petitioner Taurus R. Merchant's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED as legally frivolous and this case is DISMISSED;
2. Petitioner's motion for appointment of counsel is DENIED as moot;
3. The unpaid balance of petitioner's filing fee is \$145.93; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
4. A strike will be recorded against petitioner pursuant to 28 U.S.C. § 1915(g); and
5. The clerk of court is directed to close the file.

Entered this 30th day of October, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge