IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE L. CHERRY,

ORDER

Petitioner,

02-C-544-C

v.

GERALD BERGE, CINDY SAWINSKI,
TIM HAINES, JOLENE MILLER,
PATTI BOEBEL, NURSE JO and DR. SAFARI,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Eugene Cherry, an inmate at the Wisconsin Secure Program Facility (formerly known as Supermax Correctional Institution), alleges that respondents Cindy Sawinski, Jolene Miller, Patti Boebel, Nurse Jo and Gerald Berge refused to give him medication, that respondent Dr. Sarfari refused to treat him and that respondents Tim Haines and Berge harassed him by bringing a video camera into his cell when female nurses administered his medication. He contends that all of these actions violated his right to be free from cruel and unusual punishment under the Eighth Amendment. In addition, plaintiff has filed a motion for appointment of counsel and a

letter in which he asks that respondent Boebel be "removed" from the action, which I construe as a motion to voluntarily dismiss Boebel. He has submitted the initial partial payment required under 28 U.S.C. § 1915(1)(b).

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).

Petitioner's motion to dismiss respondent Boebel will be granted. Therefore, I will not discuss petitioner's allegations regarding Boebel. In addition, petitioner will be granted leave to proceed on his claim that respondents Safari, Sawinski, Miller, Jo and Berge violated

his rights under the Eighth Amendment by denying him adequate medical care. Petitioner's request for leave to proceed on his claim that respondents Haines and Berge violated the Eighth Amendment by bringing a video camera into his cell will be denied because it is legally frivolous.

ALLEGATIONS OF FACT

Petitioner Eugene Cherry is a prisoner at the Wisconsin Secure Program Facility. Respondent Gerald Berge is the prison's warden. Respondent Tim Haines is a unit manager. Respondent Cindy Sawinski is a supervisor of health services. Respondents Jolene Miller and Nurse Jo are nurses. Respondent Dr. Safari is a physician at the prison.

In 2000, petitioner was diagnosed with h. pylori, a stomach condition. In July, August and September 2002, plaintiff received medication for his stomach condition, as well as medication for herpes, back pain and a sleep disorder.

In July 2002, petitioner was placed on a behavioral management plan for exposing himself and using vulgar language. The plan requires petitioner to wear a gown with no shoes or socks when he leaves his cell to go to the examination room. On over 40 occasions in July, September and August 2002, respondents Sawinski, Jo and Miller refused to give petitioner his medication because he failed to comply with the behavioral plan and violated prison rules. Respondent Sawinski, Jo and Miller continued to do this even after being told

that they should not deny petitioner medication for rule violations. As a result of not receiving medication, petitioner suffers from excruciating stomach and back pain and from lesions and blisters from his herpes.

On August 3, 2002, petitioner was experiencing excruciating stomach pain. He pushed the emergency button in his cell and he requested to see respondent Safari. Respondent Safari refused to see petitioner because she had other patients to see. Petitioner continued to complain and a nurse came. She gave petitioner Pepto Bismol, but it did not help. Respondent Safari intentionally refused to examine petitioner until August 13, 2002, when she began treatment, but it has been unsuccessful. Petitioner is still in pain.

Beginning on August 23, 2002, respondent Tim Haines brings a video camera into petitioner's cell whenever a female nurse gives petitioner his medication. Respondent Haines does this to catch petitioner exposing himself. Petitioner fears beaing poisoned or framed by staff. Staff have refused to give him medication because he did not want to be in front of the camera.

Petitioner complained to respondent Berge about the behavior of respondents Sawinski, Jo, Miller and Haines, but Berge continued to allow prison staff to refuse to give petitioner medication for rule violations and to harass petitioner with a video camera.

DISCUSSION

A. Use of Video Camera

I understand petitioner to allege that respondent Haines has violated petitioner's rights under the Eighth Amendment by bringing a video camera into his cell whenever a female nurse administers his medication because petitioner has a history of exposing himself. This claim is without merit. Attempting to curb an inmate's sexually inappropriate behavior by recording his indiscretions is not contrary to "the evolving standards of decency that mark the progress of a maturing society." Farmer v. Brennan, 511 U.S. 824, 833-34 (1994) (internal quotations omitted). Plaintiff's claim that respondents Haines's and Berge's use of a video camera violates the Eighth Amendment will be dismissed as legally frivolous.

B. Refusal to Treat and Provide Medication

Petitioner alleges that respondent Safari refused to treat him for 10 days while he was in excruciating stomach pain. 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, 511 U.S. at 837. 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; Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985). 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. 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").

At this early stage of the proceedings, petitioner's allegation that he was in excruciating pain is sufficient to demonstrate that he had a serious medical need. Westlake v. Lucas, 537 F.2d 837 (6th Cir. 1976) (holding that stomach pain and abdominal distress constituted a serious medical need) (cited in Gutierrez, 111 F.3d at 1372 n.6). Further, if respondent Safari intentionally refused to see petitioner for 10 days while he was in excruciating pain, he may have acted with deliberate indifference. Petitioner will be granted leave to proceed on a claim that respondent Safari violated his right to receive adequate medical care under the Eighth Amendment. However, I note that petitioner faces an uphill battle on this claim. It will not be enough for petitioner to show that respondent Safari was unable to see petitioner because of more pressing scheduling demands or had a different view from petitioner of the necessary treatment. Rather, he must show that respondent Safari acted intentionally or with reckless disregard in refusing to treat petitioner. Further, the Eighth Amendment does not require that treatment be successful. Therefore, although it is certainly regrettable that petitioner is still in pain, that fact alone is not sufficient to show

that respondent Safari has violated the Eighth Amendment if Safari has made a good fatih effort to treat petitioner.

Also, petitioner alleges that respondents Sawinski, Jo and Miller are withholding medication from him when he violates prison rules. He alleges that he has complained to respondent Berge, but that Berge refuses to stop it. (I note that plaintiff is making similar allegations in Cherry v. Litscher, 01-C-394-C, which is currently proceeding before this court. However, because in this case petitioner has named different individuals as being responsible for the alleged violation, he is not barred by claim preclusion.)

Although plaintiff acknowledges that he was denied medication for violating prison rules, even recalcitrant prisoners are entitled to adequate medical care. Petitioner alleges that he suffered from severe pain from his stomach condition, back pain and from herpes as a result of not receiving his medication. If petitioner's medication could have alleviated this pain and respondents knew that petitioner would be harmed by a failure to provide him with medication, they may have violated the Eighth Amendment. See Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996). I will also assume that respondent Berge knew that respondents Sawinksi, Jo and Miller were denying petitioner adequate medical care and chose not to stop it. Petitioner will be granted leave to proceed against respondents Sawinski, Jo and Miller and Berge on a claim that they were deliberately indifferent to petitioner's serious medical need.

C. Motion to Appoint Counsel

In considering whether counsel should be appointed, I must determine first whether petitioner made reasonable efforts to retain counsel and was unsuccessful or whether he was precluded effectively from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Ordinarily, before the court will find that petitioner has made reasonable efforts to secure counsel it requires him to provide the names and addresses of at least three lawyers that he has asked to represent him and who have declined to take the case. Petitioner has not done that. However, his motion would have to be denied in any event.

The determination whether to appoint counsel is to be made by considering whether the plaintiff is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995)(citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). It is too early to tell whether petitioner will require appointed counsel. Therefore, petitioner's motion to appoint counsel will be denied without prejudice.

ORDER

IT IS ORDERED that

1. Petitioner Eugene Cherry's motion to dismiss voluntarily his claim against Patti

Boebel is GRANTED. Respondent Boebel is DISMISSED from this lawsuit without prejudice.

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondents Dr. Safari, Cindy Sawinski, Jolene Miller, Nurse Jo and Gerald Berge were deliberately indifferent to his serious medical needs.

3. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to his claim that respondents Tim Haines and Gerald Berge violated his rights under the Eighth Amendment by bringing a video camera into his cell. Respondent Haines is DISMISSED from this action.

4. Petitioner's motion for appointment of counsel is DENIED without prejudice to his filing a new motion at a later date.

5. Petitioner should be aware of the requirement that he send respondents 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 respondents, he should serve the lawyers directly rather than respondents. 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 respondents or to respondents' lawyers.

6. The unpaid balance of petitioner's filing fee is $148.84; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 27th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge