

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

DANIEL T. SHEA,

Plaintiff,

v.

ELAINE WHEELER,
TERRI TYSON,
RICHARD ARNESEN, and
THOMAS LALIBERTIE,

Defendants.

ORDER

00-C-0072-C

On May 26, 2000, judgment was entered dismissing this case pursuant to 28 U.S.C. § 1915A(b)(1) with respect to plaintiff's claims that he was disciplined in violation of his constitutional rights to substantive and procedural due process, because these claims were without legal merit, and pursuant to 42 U.S.C. § 1997e(a) on plaintiff's remaining claim that he was denied treatment for attention deficit disorder in violation of the Eighth and Fourteenth Amendments, because plaintiff failed to exhaust his available administrative remedies with respect to this claim. On June 8, 2000, plaintiff filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59. After considering each of the arguments plaintiff raised, I

denied the motion in an order dated August 7, 2000, concluding that plaintiff had not shown clear legal error in the order dismissing his complaint. In addition, I noted that although plaintiff had alleged that in the time that had passed between the dismissal of his lawsuit and the filing of his Rule 59 motion, he had completed the process for exhausting his administrative remedies on his failure to treat claim, plaintiff's administrative complaint had been denied as untimely, which prevented his claim from being heard in this court.

It is necessary to note that plaintiff paid the fee for filing his complaint in this case because he has "struck out" under 28 U.S.C. § 1915(g). Specifically, I have issued strikes against plaintiff Shea on May 6, 1998 in Shea v. Schachte, 98-C-8-C, on October 20, 1999 in Shea v. Smith, 99-C-456-C, and on February 14, 2000 in Shea v. Schachte, 00-C-18-C. According to § 1915(g), when a plaintiff has three strikes, he cannot bring an action or appeal in forma pauperis as long as he is incarcerated "unless the prisoner is under imminent danger of serious physical injury."

Now before the court is plaintiff's motion to enlarge the time within which he may file a notice of appeal and request for leave to proceed on appeal in forma pauperis pursuant to Fed. R. Civ. P. 24(a)(1). Plaintiff states correctly that if he were to file a notice of appeal before learning from this court whether he meets the exception to § 1915(g), he will be obligated under the 1996 Prison Litigation Reform Act to pay the \$105 fee for filing his appeal. On the other

hand, if he waits to file a notice of appeal until after this court determines whether he meets the exception to § 1915(g), he is indicating a conditional desire to appeal only and will not be obligated to pay the fee unless or until he files a notice of appeal.

A district court may extend the time for filing a notice of appeal where a party makes such a motion no later than 30 days after the time prescribed by Fed. R. App. P. 4(a) expires, which plaintiff has done, and where the party shows excusable neglect or good cause for the extension. I am persuaded that plaintiff's decision to learn whether he might qualify for pauper status under the exception to § 1915(g) is sensible and constitutes good cause to grant the requested extension. However, it will not be necessary to grant plaintiff an enlargement of time in which to file a notice of appeal or to decide whether he has shown that he is under imminent danger of serious physical injury so as to except him from the three-strike provision of § 1915(g). This is because on review of the record I am convinced that plaintiff's Rule 59 motion should have been granted to the extent that he is seeking reconsideration of the decision to deny him leave to proceed under § 1915A on his claim that he is being denied prescribed medication for his attention deficit disorder in violation of his Eighth Amendment rights.

As noted above, in denying plaintiff's Rule 59 motion, I held that the documentation of administrative exhaustion regarding plaintiff's denial of medication claim showed that plaintiff's request for administrative review had been denied as untimely. I concluded that a

ruling of an untimely filing meant that plaintiff had failed to exhaust his administrative remedies and barred his claim from being heard in this court. However, under the circumstances of this case and having reconsidered the matter, I am not satisfied with that decision.

The chronology of events surrounding plaintiff's attempts to exhaust his administrative remedies with respect to his denial of medication claim is as follows:

Throughout 1999 and earlier, plaintiff was receiving Ritalin as prescribed medication for a condition diagnosed as attention deficit disorder. On January 13, 2000, plaintiff was charged in a disciplinary complaint with misusing his drugs. As a result, his Ritalin prescription was immediately discontinued.

On January 14, 2000, plaintiff filed an inmate complaint, which was assigned number OCI-2000-2896. In it, plaintiff complained of the "arbitrary and abrupt discontinuation" of his medicine. The file does not contain documentation of the institution complaint examiner's recommendation for dismissal of the complaint. However, in my order of May 25, 2000, I inferred from the allegations in plaintiff's complaint that the denial was based on the existence of the disciplinary charge for alleged misuse of the drug.

On February 1, 2000, plaintiff was cleared of the charge that he had misused his drugs. On February 3, 2000, plaintiff filed an appeal from the institution complaint examiner's

recommendation to the Corrections Complaint Examiner to dismiss his complaint. Again, the record does not include a copy of plaintiff's appeal, so it is not possible to determine whether plaintiff brought to the Corrections Complaint Examiner's attention the fact that he had been cleared of the charge of misusing his drugs. In any event, on February 7, 2000, the Corrections Complaint Examiner agreed with the institution complaint examiner's recommendation to dismiss the complaint. On that same day, the Secretary of the Department of Corrections upheld the Corrections Complaint Examiner's recommendation for dismissal.

On May 25, 2000, this court issued its order dismissing plaintiff's Eighth Amendment claim for his failure to show that he had exhausted his administrative remedies. I held that although plaintiff had submitted some documentation to show that he had challenged the discontinuation of his medication *before* the disciplinary committee found him not guilty of misusing his drugs, he had not submitted documentation to show that he had made such a challenge *after* he was cleared of the charge. In addition, I found incorrectly that plaintiff had not filed documentation to show that he had appealed the decision denying inmate complaint no. OCI-2000-2896 through the full course of administrative review.

Following this decision, on May 30, 2000, plaintiff filed a new inmate complaint requesting the inmate complaint examiner to review the decision to discontinue his Ritalin treatment in light of the fact that he had been found not guilty of misusing his drugs. In this

complaint, plaintiff requested that the examiner find good cause for late review of the claim under § DOC 310.09(d) and OCI Proc. No. 109.05. This complaint was assigned no. OCI-2000-16318.

On June 6, 2000, the inmate complaint examiner recommended dismissal of plaintiff's complaint. In a box titled "Rejection Comment," the examiner wrote, "filed previously under OCI-2000-2896." In a box titled "Rejection Code," she wrote, "beyond 14 calendar day limit."

On June 21, 2000, the Corrections Complaint Examiner agreed with the institution complaint examiner's assessment and noted that complaint #2000-2896 was addressed on appeal and dismissed by the secretary. On June 23, 2000, the Secretary of the Division of Corrections accepted the Corrections Complaint Examiner's recommendation of dismissal as his own.

Plaintiff's claim of denial of medical care in this lawsuit is one of an ongoing deprivation. He alleges that both before and after he was cleared of the charge of misusing drugs, defendants Wheeler and Arnesen are depriving him of necessary medication for a serious disorder. He alleges that without the medication, he suffers "great mental confusion, restlessness and inattention, with comprehension and memory problems resulting in a marked degree of internal distress." Even if defendants Wheeler and Arnesen were justified initially to withhold plaintiff's

medication on the ground that he had been charged with abusing his prescribed drugs, plaintiff is alleging that they are continuing to rely on that justification even after he was cleared of the charge. Plaintiff's allegations that defendants Wheeler and Arnesen are depriving him for no legitimate reason of required medication states a claim of a violation of plaintiff's Eighth Amendment rights.

Assuming as I did in the May 25, 2000 order that the inmate complaint examiner reviewing plaintiff's first inmate complaint no. OCI-2000-2896 recommended dismissal because plaintiff had been charged with misusing his medication and assuming also that plaintiff's appeal to the Corrections Complaint Examiner from the recommended dismissal included notification to the examiner that plaintiff had been cleared of the charges, then I must find when the Secretary of the Department of Corrections accepted the Corrections Complaint Examiner's recommendation for dismissal on February 7, 2000, plaintiff had fully exhausted his administrative remedies with respect to this claim.

On the other hand, even if I assume that plaintiff's appeal to the Corrections Complaint Examiner on February 3, 2000, did not include notification that plaintiff had been cleared of the charge of misuse of his medicine, then I should have found that plaintiff's attempts in late May and early June 2000 to have his claim reheard satisfied the exhaustion requirement.

Plaintiff's second complaint was dismissed for two reasons: 1) plaintiff had raised the

same claim earlier; and 2) the complaint was untimely.

As I noted above, if plaintiff raised the same claim earlier, then he should have been found to have exhausted his administrative remedies when he submitted proof that he had appealed the recommended dismissal to the Secretary of the Department of Corrections. If plaintiff did not raise the same claim earlier, then the finding that his complaint was untimely filed is dubious and not one to which this court must defer in order to satisfy the purpose of the exhaustion requirement.

Ordinarily, a prisoner who deliberately or negligently passes up the opportunity to bring a complaint about his care or conditions to the attention of prison authorities through the administrative grievance system must be barred from bringing his claim in federal court. To hold otherwise would be to allow prisoners to bypass the statutory exhaustion requirement. Here, however, plaintiff cannot logically be held to have passed on his opportunity to raise his claim because he failed to raise it earlier. A claim that necessary medication is being denied without legitimate justification renews itself each day that a prisoner is denied the medication. It is hard to imagine how plaintiff might be held to have passed a deadline for raising this claim. I conclude, therefore, that it was legal error to hold that plaintiff's failure to file a timely inmate complaint bars him from proceeding with his claim in this court.

ORDER

IT IS ORDERED that

Plaintiff's motions for an enlargement of time in which to file a notice of appeal and for a ruling whether he has shown that he is under imminent danger of serious physical injury so as to except him from the three-strike provision of § 1915(g) are DENIED as moot.

The order of August 7, 2000, denying plaintiff's motion pursuant to Fed. R. Civ. P. 59 is AMENDED to grant plaintiff's motion for reconsideration of the dismissal of his claim that defendants Elaine Wheeler and Richard Arnesen are denying him his Eighth Amendment right to medical care by refusing to provide him with prescribed medication for attention deficit disorder.

The judgment entered herein on May 26, 2000 is VACATED. Plaintiff may proceed on his claim against defendants Elaine Wheeler and Richard Arnesen that these defendants are denying him his Eighth Amendment right to medical care.

Because plaintiff is proceeding as a paid litigant, he is responsible for serving defendants Elaine Wheeler and Richard Arnesen with his complaint. Because I have construed plaintiff's complaint to consist of various documents plaintiff

filed at different times prior to the court's May 25 decision, I am enclosing what I consider to be the operative pleading in this case with this order so that plaintiff may serve the appropriate document on defendants. A letter explaining the rules governing service of process also is enclosed.

Plaintiff should be aware of the requirement that he send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned the identity of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants.

Plaintiff should retain a copy of all documents for his own files. The court will disregard any papers or documents submitted by plaintiff unless the court's copy shows that a copy has gone to defendants or to defendants' attorney.

Entered this 7th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge