

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

LEE SIMMONS,

Petitioner,

OPINION AND ORDER
00-C-380-C

v.

KENNETH MORGAN,
LINDA MORGAN, CHRIS
ELLERD, SGT. ALDANA, MS. RENS
and DR. SAM,

Respondents.

This is a proposed civil action for declaratory, monetary and injunctive relief brought pursuant to 42 U.S.C § 1983. Petitioner Lee Simmons is an inmate at Prairie Correctional Facility in Appleton, Minnesota, a facility owned and operated by the Corrections Corporation of America. Since filing his complaint, petitioner has written numerous communications to the court and has submitted no fewer than five different documents relating to amending his complaint in which he sometimes repeats the claims he has raised in this case and summarizes what is happening in his life to date in an attempt to bring additional claims. I am ignoring the more recent submissions and considering petitioner's original complaint as the operative pleading in deciding whether to grant petitioner leave to proceed in forma pauperis. If

petitioner wants to bring additional claims, he must file a separate law suit.

Petitioner 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. Petitioner qualifies for indigent status and has paid an initial partial payment of the filing fee. This court has jurisdiction over petitioner's claims under 28 U.S.C. § 1331.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-21 (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 failed to exhaust available administrative remedies; 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.

In his proposed complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is currently an inmate at Prairie Correctional Facility in Appleton, Minnesota, but was previously an inmate at Racine Correctional Institution. The following respondents

are employees of the State of Wisconsin Department of Corrections employed at the Racine Correctional Institution: respondent Kenneth Morgan is the warden; respondent Linda Morgan is a unit manager; respondent Chris Ellerd is a security director; and respondent Sgt. Aldana is a sergeant. Respondent Rens is an employee of the Corrections Corporation of America and is a registered nurse at the Prairie Correctional Facility. Respondent Sam is a contract medical doctor for the Corrections Corporation of America at the Prairie Correctional Facility.

I. RACINE CORRECTIONAL INSTITUTION

Petitioner suffers from priapism, a condition which causes him to have involuntary erections. Petitioner's condition is well documented in his psychological and medical records. Petitioner wrote confidential letters to respondents Morgan and Ellerd to clarify that his priapism was a disability and to point out that staff members had been observing him. In his letters, petitioner asked respondents Morgan and Ellerd to talk to the staff in the health services unit about his condition and take appropriate steps to protect him from potential conduct reports and harm.

On August 11, 1999, petitioner was moved to the Jefferson Unit. Respondent Morgan assigned petitioner to room 1204. Petitioner's cellmate was Montoya Vincente, who is an

untreated convicted sex offender. Vincente touched petitioner on his buttocks two to three times while petitioner was sleeping. Petitioner thought Vincente was being nice until Vincente started to touch petitioner's buttocks in a way that made him uncomfortable. Petitioner was wakened by movement and sound coming from the lower bunk. As petitioner was getting down from his bunk, he saw Vincente holding his own penis and looking at petitioner. Initially, petitioner did not report this incident because staff members were biased against him because of petitioner's previous complaints about staff members. Also, staff members were aware that he is an African American bisexual man who has been sexually abused so they might have thought that petitioner provoked Vincente.

On August 16, 2000, petitioner reported the incident to respondent Linda Morgan and asked her why she assigned him to the same cell as Vincente; she told him not to worry. Petitioner was afraid to tell anyone what respondent Linda Morgan had said to him because she is the wife of respondent warden Kenneth Morgan. To intimidate petitioner, respondent Linda Morgan told petitioner that she would send him to a maximum security prison or an out-of-state facility if he did not keep his mouth shut.

Respondent Aldana is biased against petitioner because petitioner reported the incident in which Vincente touched petitioner's buttocks to respondent Linda Morgan. From August 16, 1999 to November 23, 1999, respondent Aldana treated him badly by sending him to his

cell, making him wait until the following shift when petitioner needed something from the officer station and throwing his mail at him. Lieutenant Diebold took petitioner to the hole and correctional officer Kilsdonk gave him a conduct report. Respondent Aldana retaliates against petitioner because respondent Aldana and inmate Vincente are both Mexican-Americans and petitioner is an African-American. Respondent Aldana treats Mexicans and Puerto Ricans better than he treats petitioner.

Petitioner wrote a letter to Jon Litscher, Dick Verhagen and James Doyle, telling them about his claim for damages against Wisconsin Department of Corrections' employees. In response, Verhagen wrote petitioner to tell him to work with the clinical services department. Respondent Kenneth Morgan told petitioner to work with the psychologist.

II. PRAIRIE CORRECTIONAL FACILITY

Petitioner is being harassed because of his previous complaints against Jon Litscher, James Doyle and Dick Verhagen. After staff at Prairie Correctional Facility learned that petitioner's complaint against staff at Racine Correctional Institution had been dismissed, they started retaliating against him for writing about the things that were happening to him.

Petitioner is having trouble with members of the Latin Kings. He has been assigned to the same cell as a member of the Latin Kings even though he has told staff that he had problems with Latin Kings at Racine Correctional Institution.

Respondent Rens is aware of petitioner's confidential file in the medical department. On March 9, 2000, petitioner was in the medical department to see respondent Sam for his continuous hip pain. As petitioner was called to the exam room, respondent Rens was coming from the area of the medical records. As petitioner and respondent Rens passed each other, they made eye contact and respondent Rens said something about Cinderella to petitioner in front of other inmates. Respondent Rens was referring to petitioner's sexual orientation.

On April 1, 2000, petitioner had an examination because of his hip and penile pain. During the examination, respondent Sam started to disrobe petitioner in front of three female staff members until petitioner asked him not to do so. Respondent Sam asked petitioner about pain in his penis and again tried to disrobe petitioner in front of female staff. Respondent Sam touched petitioner's testicles with gloves that he had taken off of a dirty food rack; as a result, petitioner has had an itch in his groin area that has not gone away.

On April 4, 2000, petitioner was seen by a urology specialist for the first time since January 23, 2000. When petitioner told the specialist about the painful lumps in his testicle area, the specialist told petitioner that the lumps were not from the medication. However, the lumps were not in petitioner's testicle area before he started taking medication or suffering from priapism. The specialist told petitioner that he did not want to do an operation on petitioner because he feared that he would be sued. Petitioner has been denied an operation to remove

the lumps that are inside his testicles. Currently, petitioner is not receiving anything for his pain.

OPINION

I. LEAVE TO PROCEED

A. Retaliation

I understand petitioner to allege that respondents retaliated against him in various ways. A prison official who takes action against a prisoner to retaliate for the prisoner's exercise of a constitutional right may be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 274 (7th Cir. 1996). The facts alleged must be sufficient to show that absent a retaliatory motive, the prison official would have acted differently. See id. at 275. Petitioner alleges that respondents at Racine Correctional Institution retaliated against him by placing him in a cell with a sex offender. Although petitioner alleges that respondents retaliated against him for the “exercise of [his] right to petition for redress of grievances to the court,” he fails to specify when he had complained, what he had complained about and who knew about his complaints. Without any specifics to support an inference that respondents acted in retaliation for petitioner's exercise of his constitutional rights, petitioner's retaliation claim fails. Similarly, petitioner's bare allegation that the staff at Prairie Correctional Institution retaliated against

him is insufficient to support a viable claim. Absent specific allegations as to who was retaliating against him and what they were doing, petitioner's allegation is insufficient to support a claim that staff members were retaliating against him.

Petitioner's allegation that he was retaliated against because he is a bisexual African-American male and has been sexually abused fails as well. Petitioner's race, sexual orientation and sexual history do not constitute the exercise of his constitutional rights, as required to pursue a viable retaliation claim. Also, petitioner's allegation that respondent Aldana retaliated against him because petitioner reported his cell mate for touching him and both respondent Aldana and petitioner's cell mate are Mexican-American fails to state a claim. That respondent Aldana and petitioner's cell mate are of the same national origin does not support an inference of a retaliatory motive. Finally, petitioner's allegation that respondent Linda Morgan *threatened* to send him to a maximum security or out-of-state facility *if* he reported her is too speculative to demonstrate retaliation. Absent allegations that petitioner complained about respondent Morgan and that respondent Morgan responded by transferring petitioner to another facility, petitioner's claim fails. Petitioner will be denied leave to proceed in forma pauperis on his claims of retaliation.

B. Failure to Protect from Harm

I understand petitioner to contend that he suffered when he was forced to live with a convicted sex offender at Racine Correctional Institution and a gang member at Prairie Correctional Institution. “[T]he mere practice of double celling is not per se unconstitutional.” French v. Owens, 777 F.2d 1250, 1252 (7th Cir. 1985) (citing Rhodes v. Chapman, 452 U.S. 337 (1981)). Petitioner has not alleged facts suggesting that his double celling resulted in a “serious deprivation of basic human needs.” Id. Petitioner does not allege that he told any prison officials that he felt threatened before his cellmate allegedly touched his buttocks. Even if any of the respondents knew that petitioner felt threatened because his cellmate was a convicted sex offender, petitioner has not alleged facts sufficient to establish that he faced “conditions which objectively ‘pos[e] a substantial risk of serious harm.’” Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). In addition, petitioner fails to allege that he was physically injured by his cell mate who was a member of the Latin Kings. 42 U.S.C. § 1997e(e) precludes a prisoner from bringing suit for “mental or emotional injury suffered while in custody without a prior showing of physical injury.” Therefore, petitioner fails to state a claim upon which relief may be granted.

C. Inadequate Medical Treatment

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 warranting constitutional protection, petitioner must allege 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). 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 be 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.

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. 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. Petitioner's allegation that respondent Sam used gloves off a dirty food rack to touch petitioner's testicles indicates that at most, respondent Sam was negligent in his treatment of petitioner. As a result, petitioner fails to state a claim against respondent Sam upon which relief may be granted under the Eighth Amendment.

Although petitioner's allegation that he suffers from painful lumps in his testicles is sufficient to demonstrate a serious medical need, he fails to show that respondents were deliberately indifferent to his needs. Despite petitioner's claim that he has not received any pain medication to alleviate the pain in his testicles, statements in petitioner's submissions to the court suggest otherwise. Petitioner's own statements demonstrate that he was receiving ibuprofen for pain. Specifically, in a letter dated May 4, 2000, petitioner wrote,

I have not received anything . . . the ibuprofen was ordered for continued hip pain. Not for my testicle pain. The urolog[ist] denied me an operation of the painful lumps in my testicles on 4-9-00 because he stated in his report that I was taking ibuprofen ordered through CCA/PCF Medical Department for my pain in the testicle area. . . .

In a response dated May 8, 2000, Ms. Hanson, an employee of Prairie Correctional Institution wrote, "Please come to medical Monday 5-8-00 @ 10:00 to meet Ms. Hanson. This is your pass." In a medical request form dated May 4, 2000, petitioner wrote, "To date none of the meds as to the ibuprofen has helped with my testicle pain." In a response dated May 8, 2000, Hanson wrote "I cannot order a Dr. to do surgery. We will have you see our M.D. and then

have a second [opinion] for urologist to address increased pain.” In another medical request form dated September 5, 2000, petitioner wrote, “To date the ibuprofen meds has caused burning and continue pain in my lower stomach, as well as burning in the tip of my [penile] area when I urinate.” That he disagreed with medical personnel by insisting that the pain medication was for his hip pain and not his penile pain does not negate the fact that he was receiving pain medication. Furthermore, petitioner was seen by a urology specialist because of his complaints of pain in his testicles. Even though petitioner may disagree with the specialist's decision not to operate, disagreement over a course of treatment does not rise to the level of deliberate indifference. See Snipes, 95 F.3d at 590. Petitioner will be denied leave to proceed in forma pauperis because he has failed to state a viable claim under the Eighth Amendment for denial of appropriate medical treatment.

D. Other Claims

Although it is unclear that respondent Rens's comment to petitioner about Cinderella referred to petitioner's sexual orientation, even if it did, I am aware of no provision in the Constitution that gives a person a right not to be subjected to such comments that do not amount to the infliction of punishment.

II. MOTION FOR APPOINTMENT OF COUNSEL

Because petitioner will be denied leave to proceed in forma pauperis on all of his claims, his motion for appointment of counsel will be denied as moot.

ORDER

IT IS ORDERED that

1. Petitioner Lee Simmons's request for leave to proceed in forma pauperis on his claims of retaliation, failure to protect from harm, inadequate medical treatment and any other remaining claims is DENIED for his failure to state a claim upon which relief may be granted.
2. Petitioner's motion for appointment of counsel is DENIED as moot.
3. A strike will be recorded against petitioner in accordance with 28 U.S.C. § 1915(g).
4. The unpaid balance of petitioner's filing fee is \$137.83; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 25th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge