IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DE'ONDRE J. CONQUEST,
#00346633

Petitioner,

v.

GERALD BERGE, DR. T. RILEY,
NURSE LOIS, NURSE JOLINE,
SHARON ZUNKER, NURSE BECKY,
GEORGE DALEY, NURSE RENEE,
NURSE SHIRLEY, NURSE SARAH,
HEAD NURSE PAM BARTELS, NURSE EDITH and
KATHERINE McQUILLAN,

Respondents.

OPINION AND ORDER
00-C-493-C

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This is a proposed civil action for monetary, injunctive and declaratory relief brought pursuant to 42 U.S.C. § 1983. Petitioner De'ondre J. Conquest, who is presently confined at Supermax Correctional Institution in Boscobel, Wisconsin, 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. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit.

Petitioner has submitted the initial partial payment required under § 1915(b)(1). Subject matter jurisdiction is present. See 28 U.S.C. §§ 1331, 1343(a).

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).

Since filing his complaint, petitioner has written numerous communications to the court, including two motions for leave to amend his complaint to add respondent Katherine McQuillan and respondent Kate. Because the allegations in the proposed amendments are the

same, I will assume that respondent Kate is the same person as respondent Katherine McQuillan and will disregard the first proposed amendment. In deciding whether to grant petitioner leave to proceed in forma pauperis, I will treat petitioner's original complaint, the second amendment and the exhibits submitted on September 18, 2000 together as his complaint. However, I am ignoring a document titled "Statement of the Case" as well as a document titled "Motion for Deliberate Indifference Support" because it is unclear that petitioner intended these documents to amend his original complaint.

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

ALLEGATIONS OF FACT

A. Parties

Petitioner De'ondre J. Conquest is an inmate at Supermax Correctional Institution. All of the respondents are employees of Supermax. Respondent Gerald Berge is the warden; respondent Dr. Todd Riley is the head physician; respondent Pam Bartels is the head nurse; and respondents Joline, Becky, Renee, Shirley, Edith, Sarah, Lois and Katherine McQuillan are nurses. Respondents George Daley and Sharon Zunker hold undetermined positions at the institution.

B. Medical Care

Petitioner is confined to his cell 24 hours a day. He has been diagnosed with cancer and his doctors have expected him to die for the past two years. It has been ordered that petitioner can receive medication whenever he requests it because of his serious and painful condition. Petitioner's essential medications are the pain relievers oxycodone and oxycontin (a controlled release of oxycodone) because they are long-lasting. Respondents have caused petitioner extreme pain because "they hate waiting on him hand and foot."

Around May 23 or 24, 2000, the health department ran out of oxycontin. When petitioner contacted the health services department about his excruciating pain, he was told that he could expect oxycontin around May 26, 2000. Even though petitioner needs oxycontin every 3 hours, he was forced to suffer for an entire week without it.

On May 23, 2000, respondent Riley told petitioner that the nurses felt manipulated by his medical needs and that petitioner delays the nurses when they bring him his medication. That same day, petitioner contacted respondents Pam Bartels, George Daley and Sharon Zunker. Petitioner sent them copies of his grievances.

Respondent Riley is responsible for giving out doses of medication. On May 30, 2000, petitioner had an appointment with oncologist Dr. Bailey. Petitioner asked Dr. Bailey to write an order to respondent Riley in which he informed respondent Riley that Riley was mistaken

in his belief that oxycontin and oxycodone were one and the same. Respondent Riley had been attempting to save money.

On May 23, 2000 and May 29, 2000, petitioner wrote to respondent Bartels. On May 31, 2000, respondent Bartels spoke to petitioner about his complaints and asked him to keep his letters within the institution. Following that conversation, petitioner wrote to respondent Bartels again, asking her what she was going to do about Dr. Bailey's concern that petitioner's blood was not thin enough, Bartel's instructions to the nurses that they should not speak to petitioner about his problems and the fact that the oxycontin ran out for a week.

On July 2, 2000, petitioner filed an inmate grievance. Petitioner's grievance was dismissed because respondent Bartel lied, saying that petitioner was receiving his medication 15-30 minutes late only. Petitioner has kept a log since his arrival at Supermax.

On July 17, 2000, petitioner complained to respondent Bartels about his urinary tract infection and the canceling of his appointments with Dr. Bailey. Respondent Bartels ignored petitioner's complaints. That same day, petitioner complained to Kimberly Nanin about his problems. Nanin is in charge of the licensing and regulation of the nurses. Petitioner did not receive a response from Nanin.

On July 19, 2000, against petitioner's advice and Dr. Bailey's orders, respondent Riley began giving petitioner his medication once every four hours instead of once every three hours.

Respondent Riley did this because petitioner had complained about the nurses's repeated delays of one to six hours in bringing petitioner his oxycodone and because it would alleviate the burden on respondent nurses. As a result of this change in medication, petitioner became constipated and had stomach pains. Petitioner did not have a bowel movement from Friday to Monday. Petitioner told respondent Riley that he did not need or want double-doses of medication.

On July 19 and July 18, 2000, petitioner notified respondent Berge about his medical condition and his need for weights and some form of activity. The recreation room is worse than petitioner's cell. One of the respondents was unsympathetic to petitioner's needs and told him to progress through the levels system. On July 20, 2000, petitioner wrote Dr. Bailey about his problems, telling Dr. Bailey about things such as the delays in receiving his pain medication, how respondents were ignoring the medical treatment orders and the problems petitioner had in receiving his pain medication.

Respondent Riley's actions caused petitioner to develop a urinary tract infection, forcing petitioner to postpone three scheduled doctor's appointments because his doctor could not do a urology exam. Petitioner told respondent Riley repeatedly that his penis hurt and burned and that he was urinating blood. At some point, Dr. Johnson (a urologist) treated petitioner's urinary tract infection with an antibiotic. Dr. Johnson told Supermax assistant physician Jeff

Jones to check petitioner's urine in four days. On July 26, 2000, petitioner's urine was checked. The test showed that his urine was infected. On July 28, 2000, petitioner was treated and his stomach pain, blood in his urine and penis pain went away.

On July 26, 2000, petitioner gave respondent nurse Shirley a nurse slip. That same day, respondent Riley examined petitioner's leg sores. Dr. Bailey told respondent Riley to treat petitioner's leg with absorbase. Instead, respondent Riley prescribed a generic lotion that made petitioner itch so badly that he scratched sores into himself. During the examination, petitioner told respondent Riley that Dr. Bailey had told petitioner that his blood was not thin enough and should be checked monthly. Respondent Riley did not check petitioner's blood in June.

C. Medicine

The following table is a summary of the date, the time petitioner requested his medication, the time he received his medication and the person who brought petitioner his medication.

Date (in 2000)	**Requested Medication**	**Received**	**Delay**	**Person who brought medication**
?	8:30 p.m.	10:30 p.m.	2 hours	Respondent Lois
May 23		4 hours after request	4 hours	Respondent Renee
May 25		4 hours after request	4 hours	Respondent Renee

July 10	6:00 p.m.	9:25 p.m.	3 hours, 25 minutes	Respondent Shirley
July 11	1:30 a.m., 2:50 a.m., 3:35 a.m., 7:45 a.m.	8:55 a.m.	7 hours, 25 minutes	Respondent Renee
July 14	2:00 p.m. (scheduled time)	3:03 p.m.	1 hour, 3 minutes	Respondent Renee
July 15	2:10 a.m.	3:25 a.m.	1 hour, 15 minutes	Respondent Rose
July 15	8:10 p.m.	9:20 p.m.	1 hour, 10 minutes	Respondent Shirley
July 17	5:44 a.m.	7:46 a.m.	2 hours, 2 minutes	Respondent Sarah
July 17	11:15 a.m.	12:47 p.m.	13 hours, 32 minutes	Unknown
July 17	6:42 p.m.	7:40 p.m.	1 hour, 2 minutes	Respondent Edith
July 17	8:30 p.m.	10:00 p.m.	1 hour, 30 minutes	Respondent Lois
July 18	11:40 a.m.	11:45 p.m.	12 hours, 5 minutes	Respondent Becky
July 18	2:00 p.m. (scheduled time)	3:00 p.m.	1 hour	Respondent McQuillan
July 20	3:20 p.m.	4:30 p.m.	1 hour, 10 minutes	Respondent Shirley
July 21	1:00 p.m., 2:30 p.m.	4:06 p.m.	3 hours, 6 minutes	Respondent Becky
July 22	10:40 p.m.	11:55 p.m.	1 hour, 15 minutes	Respondent Shirley
July 23	7:00 p.m.	8:40 p.m.	1 hour, 40 minutes	Respondent Shirley
July 24	2:05 a.m., 4:15 a.m.	6:46 a.m.	4 hours, 41 minutes	Jane Doe nurse
July 24	8:05 p.m.	9:05 p.m.	1 hour	Respondent Renee
July 25	11:00 a.m.	11:55 a.m.	55 minutes	Respondent Becky
July 26	7:30 p.m.	9:10 p.m.	1 hour, 40 minutes	Respondent Lois
July 27	9:05 a.m.	10:50 a.m.	1 hour, 45 minutes	Respondent Joline
July 29	4:40 a.m.	5:15 a.m.	35 minutes	Respondent Joline
July 29	7:10 p.m.	8:19 p.m.	1 hour, 9 minutes	Respondent Shirley

July 30	12:30 a.m.	1:22 a.m.	52 minutes	Unknown
July 31	11:05 a.m.	12:11 p.m.	1 hour, 6 minutes	Respondent Becky
August 12	2:00 (scheduled)	3:25 p.m.	1 hour, 25 minutes	Respondent McQuillan
August 15			44 minutes	Respondent McQuillan
August 16	9:20 p.m.	10:15 p.m.	55 minutes	Respondent McQuillan
August 27	2:00 (scheduled)	3:25 p.m.	1 hour, 25 minutes	Respondent McQuillan

Petitioner's pain is so bad sometimes that sleep is the only distraction until respondent nurses bring him his medication between one to five hours late.

Respondent Joline has made petitioner beg and suffer before giving him his medication. On numerous occasions, petitioner has been in so much pain and was so weak that he could not follow the policy that inmates who are waiting for medication are supposed to stand and wait in front of their cells. As a result, respondent Joline refused to give petitioner his medication. Since July 10, 2000, respondent Joline has brought petitioner his oxycodone when it has been convenient for her.

On May 23, 2000 and May 25, 2000, respondent Renee did not bring petitioner medications until four hours after he had requested medication; her excuse was that she was in intake processing eight new inmates.

When petitioner asked respondent McQuillan why she was late with his medication, she said, “Just take your medication, I volunteered to be here.” She said that she had forgotten to bring it on time. On July 18, 2000, respondent McQuillan was late in bringing petitioner his medication but petitioner let it slide.

OPINION

I. LEAVE TO PROCEED

A. Eighth Amendment: Inadequate Medical Treatment

I understand petitioner to allege that respondents violated his rights under the Eighth Amendment by providing him with 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 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 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 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; Franzen, 780 F.2d at 652-53. Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard is characterized by 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).

Petitioner's allegation that he is in severe pain because of his cancer is sufficient to establish that he has a serious medical condition under the Eighth Amendment. Petitioner's more difficult challenge will be to demonstrate that respondents were deliberately indifferent

to any of his medical needs because he has been receiving pain medication on a regular basis as well as other medical attention. At this stage of the proceeding, I am not prepared to say that petitioner cannot establish an Eighth Amendment claim and, as a result, petitioner will be granted leave to proceed in forma pauperis on this claim.

B. Conspiracy

Petitioner alleges that respondents have conspired to deprive him of his medicine. To establish a claim of civil conspiracy, petitioner must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under § 1983. A bare allegation of conspiracy is insufficient to support a conspiracy claim. See Ryan v. Mary Immaculate Queen Center, 188 F.3d 857, 860 (7th Cir. 1999). Rather, a plaintiff must allege facts from which a trier of fact could reasonably conclude that a meeting of the minds occurred among all members of the conspiracy and that each member of the conspiracy understood its objective

to inflict harm on the alleged victim. See Hernandez v. Joliet Police Dept., 197 F.3d 256, 263 (7th Cir. 1999). Nothing in petitioner's complaint supports such an inference. Petitioner has provided no explanation how or why respondents would have conspired to deprive petitioner of his medication. In addition, petitioner has failed to allege when the conspiracy was formed. See Ryan, 188 F.3d at 860 ("A conspiracy is an agreement and there is no indication of when an agreement between [respondents] was formed.") Thus, petitioner will be denied leave to proceed in forma pauperis on his conspiracy claim for his failure to state a claim upon which relief may be granted.

II. MOTION FOR PRELIMINARY INJUNCTION

Petitioner requests emergency injunctive relief, ordering his immediate transfer from Supermax Correctional Institution. In his request, petitioner repeats many of the allegations from his original complaint, including his allegation that respondent nurses are delaying giving him his medication. In addition, petitioner contends that staff at Supermax are retaliating against him for his complaints and his lawsuit. To obtain emergency injunctive relief, petitioner must show that (1) he has no adequate remedy at law and will suffer irreparable harm if the relief is not granted; (2) the irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) he has some likelihood of success on the merits;

and (4) the injunction would not frustrate the public interest. See Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985).

Even if petitioner's allegations are true, he has failed to demonstrate that he is entitled to temporary injunctive relief. Petitioner's allegations that he is not receiving his medication on time is insufficient to establish that he is presently in imminent physical danger. Further, even if respondents are delaying petitioner's medication in retaliation, he has failed to allege that this treatment is extreme enough to warrant a transfer to another prison. Petitioner's request for injunctive relief contains what is basically a new claim of retaliation. If petitioner has evidence that prison officials having knowledge of his lawsuit are taking actions against him in retaliation for his having filed a case, he is free to file a new lawsuit alleging retaliation for his exercise of his constitutional right to access the courts. However, the circumstances petitioner describes in his request fall far short of the high bar set to qualify for the extraordinary remedy of temporary injunctive relief.

III. MOTION FOR APPOINTMENT OF COUNSEL

Petitioner has requested that counsel be appointed to assist him. In determining whether counsel should be appointed, I must first find that petitioner made reasonable efforts to retain counsel and was unsuccessful or that he was precluded effectively from making such

efforts. See Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Petitioner must provide the court with the names and addresses of at least three lawyers that he has asked to represent him in this case and who have declined to take the case before I can find that he has made reasonable efforts to secure counsel.

Petitioner should be aware that if he attempts to obtain a lawyer and is unsuccessful, that does not mean that one will be appointed for him automatically. At that point, the court must determine the pro se petitioner's abilities and skills in light of the complexity of the legal issues and evidence in the case. See Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). "The simpler the case, the less intelligent or experienced the petitioner need be to handle it without assistance of counsel." Id. at 321. This case is simply too new to permit the court to assess petitioner's abilities. Therefore, his motion for the appointment of counsel will be denied, without prejudice to his renewing the motion at some later stage of the proceedings.

IV. OTHER MOTIONS

Petitioner has filed a motion for summary judgment, two requests for production of documents and a motion to subpoena medical records. All of these submissions are premature at this point in the proceedings. I will give no consideration to these documents at this time.

ORDER

IT IS ORDERED that

1. Petitioner De'Ondre Conquest's request for leave to proceed in forma pauperis on his Eighth Amendment claim against respondents Gerald Berge, Dr. T. Riley, Nurse Lois, Nurse Joline, Sharon Zunker, Nurse Becky, George Daley, Nurse Renee, Nurse Shirley, Nurse Sarah, Pam Bartels, Nurse Edith and Katherine McQuillan is GRANTED;

2. Petitioner's request for leave to proceed in forma pauperis on his conspiracy claim is DENIED for his failure to state a claim upon which relief may be granted;

3. Petitioner's motion for a preliminary injunction is DENIED;

4. Petitioner's motion for appointment of counsel is DENIED without prejudice;

5. Service of this complaint will be made promptly after petitioner submits to the clerk of court thirteen (13) completed marshals service forms and fourteen (14) completed summonses, one for each respondent and one for the court. Enclosed with a copy of this order are sets of the necessary forms. Also enclosed with this order is one copy of the complaint, which includes the original complaint, the second amendment (a document titled "Motion for Additional Defendant/Addendum") and the exhibits submitted on September 18, 2000. Petitioner must return thirteen (13) copies of the complaint for service on respondents. If petitioner fails to submit the completed marshals service, summons forms and copies of the

complaint (including both the original complaint, the second amendment to the complaint and the exhibits) before November 13, 2000, or explain why he cannot do so, his complaint will be subject to dismissal for failure to prosecute;

6. In addition, 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 lawyer who will be representing respondents, he should serve the lawyer 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 respondent or to respondent's attorney; and

7. The unpaid balance of petitioner's filing fee is $120.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 30th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge