

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

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DEMONTERRYO L. BLACK,

Petitioner,

v.

WARDEN JANE GAMBLE, BILL McCREEDY,  
KMCI HEALTH SERVICES UNIT and  
UW WISCONSIN MADISON HOSPITAL,

Respondents.  
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OPINION AND ORDER

00-C-696-C

This is a proposed civil action for injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Demonterryo Black, who is presently confined at the Kettle Moraine Correctional Institution in Plymouth, 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 payments required under § 1915(b)(1).

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).

Because petitioner has failed to allege facts sufficient to support an Eighth Amendment claim, his request for leave to proceed in forma pauperis will be denied for his failure to state a claim upon which relief may be granted.

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

## ALLEGATIONS OF FACT

### A. Parties

Petitioner is an inmate at Kettle Moraine Correctional Institution. Respondent Jane Gamble is the supervisor of the institution and respondent Bill McCreedy is the health services unit supervisor at the institution.

### B. Medical Care Claim

On August 23, 2000, petitioner had surgery on his testicles. On August 28, 2000, petitioner went to respondent health services unit because he had blood and pus leaking out of his surgical wound. Petitioner was seen by health services because he had asked the unit sergeant to call after he had put in a request on the previous day. Upon examination, petitioner was told that he was fine.

On August 30, 2000, petitioner filed another request for medical assistance because the bleeding and draining of pus continued and the stitches were not pulling together. When petitioner was seen in respondent health services unit, petitioner was told that he was going back to the University of Wisconsin Hospital the next day for his follow up examination. During his visit at the hospital, petitioner was told that his stitches and the drainage looked good, that the drainage was normal but to watch it when the swelling went down and that he

could shower. Hospital staff clipped the tails of his stitches and told him that he should be healed in three weeks.

On September 15, 2000, petitioner put in another request to respondent health services unit because he was bleeding, the wound was open and the flesh inside his scrotum could be seen. Staff in the health service unit told petitioner that only a small piece of his flesh could be seen and that he would be fine. On September 19, 2000, petitioner was examined by Nurse Dan Koltzbach in respondent health services unit. Koltzbach told petitioner that he was not healing properly because he had not been stitched properly after surgery, that the inside lining of his scrotum sack was turned out and that it would not heal properly without another operation to tuck it back inside or cut it off. Koltzbach requested a follow-up appointment for petitioner with Nurse Practitioner Heidi. On September 21, 2000, Nurse Heidi saw petitioner and told him that he had scar tissue and that she would reexamine him in four weeks. She told petitioner that she would do something at that time if he had not healed properly at the follow-up appointment. Petitioner told her that he had two lumps on his right testicle that were not there when he had the surgery. Nurse Heidi told petitioner that the lumps were scar tissue and that she would monitor the lumps as well as the healing of the wound.

On September 28, 2000, petitioner was seen by Koltzbach who confirmed again that the wound was not going to heal properly without a simple procedure to remove a piece of

tissue, a procedure Koltzbach could do in the health service unit office. Koltzbach told petitioner that there would be a small lump if the wound did heal on its own, which it has done.

Currently, the wound is open and leaks fluid. Koltzbach has said that petitioner is at risk of infection and he provided petitioner with an antibiotic cream and Tylenol for the pain. On September 28, 2000, the health service unit returned petitioner's request for medical treatment, stating that Nurse Koltzbach had talked to Nurse Heidi and Heidi had said that the tissue will grow new skin over it and that she was going to see petitioner in 3 weeks. Petitioner had made the request because he had pain in his lower abdomen and testicles and pus leaking out of his wound.

During this ordeal, petitioner has experienced pain and suffering. He could not return to his everyday activities. He has made diligent efforts to obtain adequate medical treatment from respondents.

#### OPINION

Petitioner contends 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 alleges that he has had some complications from his surgery he had on his testicles. Regardless whether petitioner's allegations are sufficient to demonstrate that he had a serious medical need, he has failed to allege facts to support a finding that any of the respondents were deliberately indifferent to any of his medical needs. (Petitioner has not named as respondents any individuals who were personally involved with his medical treatment.)

Petitioner's allegations that respondents were deliberately indifferent to his medical needs demonstrate the opposite. Petitioner fails to allege any facts to support an inference that any of the respondents or any employees of the health services unit or hospital knew that he was suffering from serious medical conditions and recklessly disregarded such conditions, causing him needless pain and suffering. In the five weeks following his surgery, petitioner was treated in the health services unit on six occasions and treated by the University of Wisconsin at a follow-up appointment. Nurses Heidi and Koltzbach examined petitioner repeatedly to determine whether his wound was healing properly and told him that further treatment would be provided if it was determined to be necessary. Even though petitioner may disagree with the

course of treatment he received, such a disagreement does not rise to the level of deliberate indifference. See Snipes, 95 F.3d at 590. “A prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition.'” Id. at 592. Petitioner was not entitled to whatever treatment he desired; he is entitled only to the level of treatment that meets the standards of the Eighth Amendment. He received such treatment. Accordingly, his request for leave to proceed in forma pauperis on his Eighth Amendment claim will be denied for his failure to state a claim upon which relief may be granted.

#### ORDER

IT IS ORDERED that petitioner Demonterryo Black's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED for his failure to state a claim upon which relief may be granted and this action is DISMISSED. A strike will be recorded against petitioner in accordance with 28 U.S.C. § 1915(g). The unpaid balance of petitioner's filing fee is \$116.07; petitioner is obligated to pay this amount in monthly

payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 8th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB  
District Judge