IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DIEGO GIL,

ORDER

Petitioner,

00-C-724-C

v.

JAMES REED, MOHAMMAD ASLAM,
NESTOR OSORIO, JAIME PENAFLOR
and UNITED STATES OF AMERICA,

Respondents.

- -

This is a proposed civil action for monetary relief, brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Petitioner Diego Gil, who is presently confined at the Federal Correctional Institution in Oxford, 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).

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 constitutional claims 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 contends that the individual respondents provided him with inadequate medical care in violation of the Eighth Amendment and that respondent United States is liable under the Federal Tort Claims Act for the negligent or reckless provision of medical care to him. Petitioner will be granted leave to proceed in forma pauperis on his claim under the Federal Tort Claims Act against respondent United States of America and under the Eighth

Amendment against respondents Reed and Penaflor.

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

ALLEGATIONS OF FACT

I. PARTIES

All individual respondents are Wisconsin citizens who are employed by the United States Department of Justice, Federal Bureau of Prisons and assigned to the Federal Correctional Institution at Oxford, Wisconsin. Respondent James Reed is Clinical Director and was responsible for petitioner's medical care. Respondent Mohammad Aslam is a staff physician. Respondents Nestor Osorios and Jaime Penaflor are physician assistants.

II. MEDICAL CARE IN CHICAGO

On or about June 4, 1993, petitioner was taken to the Metropolitan Correctional Center (MCC) in Chicago from the Lake County jail in Waukegan, Illinois. Petitioner had had an ulcer for which he took medication for more than four years before his arrest. Upon his arrival, petitioner notified MCC staff of his medical condition and was told he could not have medication and that hospital staff would contact him later. Between June 7, 1993 and June 23, 1993, petitioner complained numerous times to the officers on the floor, telling them that

he was in pain, especially during the nights, and that he could not keep any food down. The officers contacted the hospital staff and were told each time that a physician assistant would see petitioner. No physician assistant came.

On or about June 23, 1993, petitioner told his unit team during a program review that he was in pain and needed medical attention. The unit team said they could do nothing. On or about June 25, 1993, petitioner began to vomit blood. After an officer called the hospital, medical staff took petitioner to the MCC hospital. Medical staff gave petitioner four pills, with no refill, and sent him back to his cell. Petitioner was then given medication until July 4, 1993. Petitioner continued to throw up his food and suffer pain.

During August and September 1993, floor officers tried to contact medical staff on petitioner's behalf but were told that the medical staff could do nothing for him and that he should be patient and wait. On or about August 30, 1993, medical staff said petitioner would soon be taken to an outside hospital and seen by a specialist. On or about September 8, 1993, petitioner asked to be seen by a doctor and not a physician assistant but staff denied his request.

On or about September 11, 1993, petitioner was weak and emaciated and was helped by other inmates to the area for seeing medical staff. When petitioner complained about his condition, he was taken to the MCC hospital. After an examination, medical staff noted his

condition and petitioner was rushed to the Chicago Osteopathic Medical Center. Upon petitioner's arrival at the medical center, the doctor ordered tests, then ordered that petitioner stay at the medical center because he needed an operation to treat his bleeding ulcer. The doctor said that petitioner's physical condition was too weak to allow him to be operated on immediately and that he would have to wait a few days for petitioner to gain strength before the surgery. The doctor said that if another two or three days had passed without petitioner receiving medical attention, petitioner would have died. Petitioner had the operation and stayed in the medical center until September 18, 1993, when he was brought back to the Metropolitan Correctional Center in Chicago.

The doctor told MCC staff to bring petitioner back to him to remove the thirty staples across his stomach. On or about September 23, 1993, medical staff at the MCC hospital removed the staples. The staff lacked proper tools and yanked, tugged and jerked the staples out, causing petitioner to bleed profusely and suffer terrible pain. Petitioner was sent back to his cell with a bandage over his still-bleeding abdomen.

On or about September 23, 1993, petitioner began bleeding heavily during a bowel movement. Without conducting any examination, MCC medical staff said that petitioner had a hemorrhoid. On or about September 24, 1993, petitioner's bleeding intensified. He was brought to the MCC hospital and given some suppositories. Petitioner told the medical staff

that his problem was not a hemorrhoid and that something might have gone wrong with the ulcer operation or subsequent staple removal. Medical staff told petitioner nothing was wrong with him.

On or about September 25, 1993, at around 4:30 a.m., petitioner's bleeding worsened. An officer contacted medical staff, who arrived to check petitioner's blood pressure. Medical staff returned with more equipment for additional tests. Petitioner was told that everything appeared to be normal. Medical staff told him that they did not believe he was bleeding during bowel movements. Around 7:00 a.m. the same day, petitioner again began to bleed badly. Petitioner's cellmate called the officer and showed him the blood. The officer ordered the toilet to be flushed. By 8:00 a.m., medical staff told petitioner that he did not have a medical problem but that his blood sugar was low so he should drink some lemonade. By 9:00 a.m., petitioner was carried by stretcher to the MCC hospital. After more tests, petitioner was told that nothing was wrong and that his complaints that he was bleeding were not believable. Around 4:30 p.m., different medical staff witnessed petitioner's bleeding. Medical staff called 9-1-1 and petitioner was rushed to an outside hospital.

At the hospital, petitioner was placed in the intensive care unit and given blood transfusions. Petitioner was then transferred to the Chicago Osteopathic Medical Center and placed in an intensive care unit where he received additional blood transfusions. Petitioner

remained in the intensive care unit until September 28, 1993, and was placed in a regular hospital room until September 30, 1993. On September 30, 1993, petitioner was returned to MCC Chicago.

III. MEDICAL CARE AT OXFORD

A. Initial Diagnosis

After petitioner was transferred to the Federal Correctional Institution at Oxford, he reported his medical condition to medical staff. On numerous occasions, petitioner went to medical staff seeking relief from the pain and incredible discomfort of his rectal prolapse and was told every time that he simply had hemorrhoids. Petitioner was treated for hemorrhoids, provided with hemorrhoidal medication and advised that an outside doctor would come in to examine him. For three years, petitioner waited for the outside specialist to examine him. During those years, petitioner was forced to push back into his body a fist-sized protuberance every time he had a bowel movement.

Finally, an outside doctor saw petitioner and advised after a cursory examination that petitioner required a hemorrhoid operation. About this time, petitioner began experiencing additional symptoms. Off and on, he had pain in his right abdominal region that felt as if it were caused by a great pressure pushing outward. When petitioner reported this new problem

to medical staff, he was told that it sounded as if he had a hernia. After an examination, staff were unable to find a hernia and told petitioner that his claims were unbelievable.

Eight months afer the outside specialist determined that petitioner needed surgery, petitioner was still in great pain and filed a BP-8 administrative remedy form and threatened judicial redress to compel the medical staff to help. A few weeks later, on or about March 4, 1998, petitioner was taken to Mercy Medical Center for an operation to correct the hemorrhoids and repair the hernia. At Mercy, petitioner was examined by a doctor who discussed with him in detail his condition and then conducted a physical examination. The doctor told petitioner that his medical condition was much more serious than the prison medical staff had said and that he required major surgery because what had been extending out of his body was his colon. The next day, another hospital doctor examined petitioner. He also told petitioner that he needed major surgery because it was his colon that had been coming out of his body during bowel movements. Petitioner was told that he did not have a case of hemorrhoids, but instead had a serious rectal prolapse.

B. <u>After First Rectal Prolapse Operation</u>

Petitioner had the rectal prolapse operation. He was later returned to his cell at Oxford. On or about March 19, 1998, petitioner began to suffer great pain and asked the unit officer

to call medical staff for an emergency sick-call. The unit officer tried to contact medical staff but was told that there was no trained medical staff member in the institution because there was no longer twenty-four hour medical service for inmates at Oxford.

On Friday, March 20, 1998, petitioner asked the unit officer to call the medical staff for an emergency sick-call because he was still experiencing severe pain and could barely walk. Petitioner saw medical staff and told them of his worsening condition, pain and inability to sleep or rest. Medical staff gave petitioner a brochure on back exercises and told him to begin doing the exercises immediately. Medical staff noted on petitioner's medical records that he had "no urgent back pain" and that his request for medical assistance was a "missuse of emergency care." That Saturday and Sunday petitioner was forced to wait two more days in severe pain and increasing discomfort for the next available sick call on Monday, March 23, 1998. On March 23, 1998, petitioner awoke from a restless sleep to find a bulge the size of a ping-pong ball within his surgical incision. Petitioner was examined by the medical staff, who determined that his incision was infected. Medical staff lanced the bulge, which erupted with a foul smelling poison. The staff physician prescribed pain medication and an antibiotic and told petitioner to begin taking the antibiotic immediately. The doctor told petitioner that the medications would be available that evening at medication line.

That evening, petitioner arrived at the evening medication line to pick up his pain

medication and the antibiotic. Respondent Penaflor grabbed the two bottles and gave petitioner the one with the pain medication. Respondent Penaflor held onto the antibiotic for a moment, then told petitioner in a hostile tone that he could not have the antibiotic. Respondent Penaflor refused to give petitioner a reason for his refusal. Petitioner was told to go back to the unit or he would be placed in segregation housing. Petitioner returned to his unit and told the unit officer what had happened at the medication line. The officer called the hospital for an explanation but was told that the staff was too busy, at which point medical staff hung up on the officer. Petitioner was forced to wait another day for the antibiotic. For the next ten days, petitioner made sick call so that the infection could be lanced and drained.

On or about March 15, 1998, petitioner told medical staff that when he tried to have a bowel movement, his colon was still extending out of his body. Medical staff brushed petitioner's pain and fear aside, telling him "everything will be all right." The rectal prolapse operation was a failure and petitioner still suffered from his colon problem and the on and off painful sensation of pressure pushing outward on the side of his abdomen. Petitioner was still forced to painfully push his colon back into his body after every bowel movement.

Petitioner was told that he needed another operation but that his body would need at least a year to recover from the trauma already suffered. On or about March 29, 1999,

petitioner asked to see a specialist to evaluate the large ventral hernia he now had at his midline across the lower abdomen as a result of the failed prolapse operation and to see when he could have the corrective operation to repair both the rectal prolapse and the incisional hernia damage. Medical staff told him that a surgical consultation would be forthcoming. Petitioner also asked if he could have an abdominal binder because the hernia was so big that it caused pain when he walked or coughed. Staff gave petitioner a "rib binder" that would not support the abdomen.

On or about June 14, 1999, an outside surgeon said without a physical examination that the rectal prolapse operation done previously was unsuccessful. The surgeon said petitioner required a surgical procedure by an expert in this specific field to correct his prolapse problem and that he would also need an operation to repair the incisional hernia caused by the failed operation. On or about July 7, 1999, petitioner told medical staff that pushing his colon back into his body was extremely uncomfortable and painful. At times his colon became swollen and he was unable to sit. Petitioner said also that the hernia was bothering him whenever he moved.

On or about August 4, 1999, an outside doctor said that petitioner had two serious problems, the hernia caused by the failed prolapse operation and the need for another operation to repair his colon. The doctor said that petitioner faced a 90% risk of impotence if

nerves were cut and that the doctor could not guarantee that the operation would be successful. On or about August 26, 1999, petitioner asked for an appointment with a specialist for a second opinion on the proposed operations. Medical staff told him that petitioner had already been seen by two surgeons. Petitioner said that one doctor never conducted a physical examination and told petitioner that he needed to be evaluated by a specialist.

On or about September 14, 1999, seeking relief from both the rectal prolapse and the incisional hernia, petitioner asked again that medical staff provide him with a second opinion from a specialist. On or about October 19, 1999, seeking relief from his pain and discomfort, petitioner asked medical staff about the possibility of getting a second opinion from a specialist. Petitioner said also that because of the hernia compounding the prolapse problem, his ability to participate in any activity was severely limited because he was emotionally and physically exhausted from coping with his serious medical conditions. Medical staff told petitioner that he was scheduled to see a surgeon.

On or about December 4, 1999, following a discussion but no physical examination, an outside doctor gave petitioner the following two options for the required surgery: petitioner's colon could be corrected using the same procedure as before which meant going through the abdomen or it could be corrected by going through the rectum which would spare further trauma to the abdomen and avoid any chance of impotency. Petitioner then asked why, if the

doctors could avoid tearing up his abdomen and possible nerve damage, they had used the abdomen method during the first operation. The doctor ignored petitioner's question and recommended that a specialist familiar with his particular medical problem examine petitioner.

On January 6, 2000, eight months after an outside doctor recommended that petitioner see a specialist, petitioner was taken to the office of Dr. Michael Kim. After conducting a physical examination, Dr. Kim told petitioner that he would need two separate operations. The first would correct the colon problem through the rectum and the second would be done after his body healed to correct two hernias, the incisional hernia and the umbilical hernia. In response to petitioner's question, Dr. Kim said he had no idea why the other doctor had not done the first operation through the rectum. On or about January 10, 2000, medical staff said that they had not received Dr. Kim's recommendations.

On or about May 1, 2000, petitioner was taken to Mercy Medical Center for the corrective surgery to be performed by Dr. Kim. After the rectal prolapse operation, Dr. Kim prescribed medication to prevent constipation (a problem that could cause the rectal prolapse to return) and a pain reliever other than Tylenol III (which could cause constipation). During petitioner's return to Oxford, staff gave no consideration to his ordeal and transported him in a van in which petitioner was forced to lie in an extremely uncomfortable position with his

ankles cuffed and his wrists shackled to his waist. During the two hour trip, petitioner rolled and tossed in great pain and at times fell off the bench seat.

When petitioner arrived at the prison, he was gravely ill and vomited. Medical staff gave petitioner two Tylenol III tablets. On or about May 2, 2000, petitioner complained to respondent Dr. Reed that Dr. Kim had warned specifically against taking Tylenol III and that other medications were necessary. Respondent Dr. Reed said that petitioner would be given the medications prescribed by Dr. Kim. The same day, petitioner was given a bottle of docusate sodium, 100 mg, and told to go to the medication line three times a day for Tylenol III pain medication.

On or about May 5, 2000, petitioner was desperate to see a doctor. He had not had a bowel movement since before the operation on May 1. He was experiencing severe pain in his abdomen and could not urinate. Respondent Dr. Reed prescribed milk of magnesia. When petitioner went to the medication line that day to pick up the medicine, he was told no medication was ready. Petitioner then asked about the Metamucil fiber Dr. Kim had prescribed and was told that respondent Dr. Reed had cancelled the order.

On Saturday, May 6, 2000, petitioner went to see respondent Osorio to get the milk of magnesia. Respondent Osorio told petitioner he could not get at the medication and that petitioner would have to wait until Monday. On Monday, May 8, 2000, petitioner went to the

medication line at 11:30 a.m. and was told that the medicine would not be ready until the 7:30 p.m. medication line. Petitioner received the milk of magnesia at the 7:30 p.m. medication line.

On or about May 9, 2000, petitioner made an appointment with respondent Dr. Reed. Petitioner went to the prison hospital at 1:30 p.m. and was told to wait. After an hour, petitioner was bleeding profusely from the rectum, in severe pain and could not wait any longer for Dr. Reed. Petitioner returned to his room to change his clothes and lie down. Around 11:30 p.m. the same day, petitioner asked the unit officer for assistance because he was still bleeding badly and in great pain. The unit officer called physician assistant Walker, who examined petitioner and told him that an appointment with respondent Dr. Reed would be made for the next morning. Walker gave petitioner two Tylenol III tablets for his pain.

On or about May 10, 2000, petitioner went to the hospital at 6:30 a.m., but was told to return at 8:30 a.m. At 8:30 a.m., respondent Dr. Aslam and physician assistant Walker examined petitioner, took x-rays and concluded that he had been severely constipated for the last nine days. The constipation was causing the terrible pain and bleeding, tearing the colon and preventing petitioner from urinating. Petitioner's bladder was drained with a catheter and he was given two enemas. Staff advised petitioner to stop taking the Tylenol III because that was causing the constipation. Petitioner was then provided with Motrin pain medication.

On or about May 11, 2000, petitioner was taken to see Dr. Kim at his office in Oshkosh. Dr. Kim asked petitioner if he was following his directions. Petitioner said that for the past nine days he had been severely constipated and explained what had happened the day before. Petitioner told Dr. Kim that he was being told to take Tylenol III three times a day, docusate sodium twice a day and, since May 8, 2000, milk of magnesia. Dr. Kim told petitioner that he did not want him taking any Tylenol and was upset. Dr. Kim also asked petitioner why he did not receive the milk of magnesia the first day and why he was not taking the prescribed Metamucil fiber. Dr. Kim prescribed these medications again and sent the prescription with the escort officers.

When petitioner returned to the prison, he saw respondent Dr. Reed, who told petitioner that the medications would be available that evening at the 7:30 p.m. medication line. At the medication line, petitioner asked respondent Penaflor for his medication. Penaflor tried to give petitioner Tylenol III tablets. Petitioner told him about Dr. Kim's prescriptions and advice that petitioner not take Tylenol. Petitioner refused to take the medication. When petitioner asked for the milk of magnesia, Metamucil fiber and something for his pain, respondent Penaflor said that he had no medication for petitioner except the Tylenol III and that petitioner could make sick-call the next day.

On or about May 12, 2000, petitioner saw respondent Dr. Aslam and told him that Dr.

Kim was upset that the medications he prescribed were not being provided. Petitioner told respondent Dr. Aslam that Dr. Kim had warned that his treatment was necessary because petitioner should not become constipated, which could cause a return of the rectal prolapse. Respondent Dr. Aslam said that Dr. Kim's prescription recommendations would be fulfilled and provided that day, but that the only pain medication he would provide was Tylenol III. Still in great pain, petitioner refused the Tylenol medication. At the 3:30 p.m. medication line that day, petitioner was given the Metamucil fiber, a refill of milk of magnesia, a refill of docusate sodium and some over-the-counter Motrin tablets for his severe pain.

On or about June 30, 2000, petitioner asked to have repaired the two hernias he had suffered from the earlier surgical procedure. Respondent Dr. Reed said that petitioner would be scheduled to see an outside surgeon. Respondent Dr. Reed agreed to petitioner's request that Dr. Kim be asked to do the operation. On or about July 18, 2000, petitioner was taken to see Dr. Kim in Oshkosh. Dr. Kim examined petitioner and agreed to perform the hernia repairs. On or about August 7, 2000, petitioner was taken to Mercy Medical Center in Oshkosh, Wisconsin, for an operation to repair both the incisional and umbilical hernias.

DISCUSSION

Petitioner contends that respondent United States of America provided him with

negligent, reckless and improper medical care. He contends also that respondents Reed, Aslam, Osorio and Penaflor violated his right under the Eighth Amendment to adequate medical treatment by denying and delaying his access to medication and appropriate medical care.

I. PRIOR LAWSUITS

Petitioner has filed two previous lawsuits in this court arising out of many of the same facts. The complaint in Gil v. Jones, 99-C-38-C, was received in January 1999, and contains allegations about the medical care petitioner received through March 1998. In an order entered July 20, 2000, I granted summary judgment on the merits to respondents Reed and Aslam on petitioner's claim that those respondents provided petitioner with inadequate medical treatment in violation of the Eighth Amendment between May 1997 and March 6, 1998. Because the merits of petitioner's claim that respondents Aslam and Reed unreasonably delayed for eight months in arranging for surgery that had been prescribed for him by a physician outside the prison were addressed in the earlier case, I will analyze petitioner's Eighth Amendment claims only as to facts alleged to have occurred after his first rectal prolapse operation in March 1998.

In Gil v. United States of America, 00-C-217-C, petitioner sued under the Federal Tort Claims Act for alleged negligence that occurred up to February 22, 2000. Petitioner was denied

leave to proceed in forma pauperis in that case for failure to state a claim upon which relief can be granted because he had not exhausted his administrative remedies pursuant to 28 U.S.C. § 2675(a). Because that case did not address the merits of petitioner's claim under the Federal Tort Claims Act, I will consider those claims in the current case.

Petitioner also filed a suit in the District Court for the Northern District of Illinois based on his medical treatment at the Metropolitan Correctional Center in Chicago in 1993. See Gil v. Medical Director of the Metropolitan Correctional Center, 95 C 5217, 1997 WL 112818 (Mar. 10, 1997) (denying defendants' motion to dismiss and appointing counsel for petitioner). The docket sheet for that case indicates that a judgment was entered on August 15, 2000, dismissing the case with prejudice. Therefore, petitioner will be denied leave to proceed on any claims based on medical treatment he received at the Metropolitan Correctional Center in Chicago.

II. FEDERAL TORT CLAIMS ACT

I understand petitioner to contend that respondent United States of America negligently or recklessly breached a duty of care to provide him with adequate medical care. The Federal Tort Claims Act, 28 U.S.C. §§ 2671—2680, provides in part that the United States "shall be liable, respecting the provisions of this title relating to tort claims, in the same

manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Because a claim brought under the FTCA is governed by "the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), this negligence claim is controlled by the substantive law of Wisconsin. See Campbell v. United States, 904 F.2d 1188, 1191 (7th Cir. 1990). Wisconsin recognizes the tort of medical malpractice. The elements of a medical malpractice claim in Wisconsin are that the care provider failed to use the required degree of skill, the patient was harmed and there is a causal connection between the provider's failure and the harm the patient suffered. See Wis J-I Civil 1023. In addition, the Bureau of Prisons owes a duty to provide federal prisoners with "safekeeping, care, and subsistence" independent of any inconsistent state rule governing the duty of care owed by state correctional officials to state prisoners. 18 U.S.C. § 4042(2); see also United States v. Muniz, 374 U.S. 150, 164-65 (1963). This duty requires Bureau of Prisons employees to exercise "'ordinary diligence to keep prisoners safe and free from harm.'" Castor v. United States, 883 F. Supp. 344, 350 (S.D. Ind. 1995) (quoting Cowart v. United States, 617 F.2d 112, 116 (5th Cir. 1980)).

Claimants seeking damages under the Federal Torts Claims Act are required to exhaust administrative remedies prior to bringing suit in federal court. See 28 U.S.C. § 2675(a). Those remedies are exhausted by filing a claim for damages with the relevant federal agency. If the relevant federal agency does not "make final disposition of a claim within six months after it is

filed" the claimant may deem such failure to act a "final disposition" for purposes of the Act, at which point suit may be brought in federal court. Id. The record reveals that petitioner filed two administrative claims for damages with respondent United States of America. Claim number 99-583 for $2,000,000 in damages for petitioner's medical treatment between 1993 and February 2000 was received on September 7, 1999 and amended by petitioner February 28, 2000; a response was due by August 28, 2000. Claim number 2000-01592 for $1,000,000 in damages based on petitioner's medical treatment in May 2000 was received on June 5, 2000 and a response was due December 2, 2000. Petitioner alleges that he has not received a response to either claim. Because the date for the government's response to each claim has passed, it is appropriate for petitioner to assume that the claim is denied. See 28 C.F.R. § 543.31(g). Therefore, petitioner has exhausted his available administrative remedies with respect to his claims under the Federal Tort Claims Act.

Because petitioner has alleged facts sufficient to suggest that employees of respondent United States of America were at least negligent in the medical care they provided petitioner while he was incarcerated at the Federal Correctional Institution at Oxford, he will be granted leave to proceed against respondent United States of America on his claim under the Federal Tort Claims Act.

III. 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. Petitioner's allegations indicate that he suffered from serious medical needs.

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 only allegation against respondent Osorio, that Osorio told petitioner that he could not get at the milk of magnesia on Saturday, May 6, 2000, does not state a claim under the Eighth Amendment. The allegation indicates only that Osorio did not have the authority or ability to obtain the medicine for petitioner and not that Osorio intended to deprive petitioner of it. Similarly, petitioner has failed to state a claim under the Eighth Amendment against respondent Aslam. The only allegations against respondent Aslam are that he provided petitioner treatment for constipation and said that Dr. Kim's prescriptions would be fulfilled but that Aslam could only give petitioner Tylenol III pain medication. Although respondent Aslam's provision of Tylenol to petitioner may have been negligent, it does not indicate that Aslam was deliberately indifferent to petitioner's pain. Furthermore, petitioner alleges that at the 3:30 p.m. medication line on the day that respondent Aslam told petitioner

he could only give petitioner Tylenol, petitioner received Motrin pain medication.

Petitioner's allegation that respondent Penaflor refused "in a hostile tone" to give petitioner his prescribed antibiotic, even though the antibiotic had been made available for him to pick up at the medication line, may indicate that respondent Penaflor was deliberately indifferent to petitioner's serious medical need. Petitioner's allegations that respondent Reed cancelled the Metamucil order that had been prescribed for petitioner by Dr. Kim and allowed petitioner to wait for an hour in great pain for an appointment suggests that respondent Reed may have been deliberately indifferent to petitioner's pain and medical needs despite Reed's knowledge of petitioner's medical history and needs. Petitioner will be granted leave to proceed against respondents Penaflor and Reed.

IV. MOTION FOR APPOINTMENT OF COUNSEL

In considering whether counsel should be appointed, I must determine whether petitioner made reasonable efforts to retain counsel and was unsuccessful or whether he was precluded effectively from making such efforts. See Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Ordinarily, before the court will find that the petitioner has made reasonable efforts to secure counsel it requires a plaintiff 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 does not suggest that he has made any effort to obtain counsel on his own. However, petitioner's motion would be denied even if he had made a showing that he had contacted three lawyers and been turned down.

Counsel usually will not be appointed if I determine that the pro se plaintiff is competent to represent him or herself given the complexity of the case. See Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). Making this determination requires consideration of the pro se plaintiff's abilities and skills in light of the complexity of the legal issues and evidence in the case.

Petitioner requests "Appointment of counsel to assist a Spanish speaking plaintiff." By this statement, I assume petitioner is suggesting that his use of English as a second language disadvantages him in his ability to litigate this case. If petitioner's knowledge of the English language is limited, it is not apparent from the pleading he filed in this case, or from his communications in the other cases he filed in this court. I am not persuaded that language limitations will impede petitioner's ability to litigate this case. Moreover, although being a prisoner means that petitioner will have to manage his time carefully in order to visit the law library and complete his submissions in this case, I do not believe that his circumstances require appointed counsel. In this court, persons representing themselves are accorded wide latitude in complying with the rules and procedures applying to their cases. In most instances, if proper

procedure is not followed, the pro se litigant is directed to the relevant written rule and given a second opportunity to comply.

Finally, petitioner's case is not complex. He is seeking money damages for respondents' failure to provide him with adequate medical care. The law governing these kind of Eighth Amendment and Federal Tort Claims Act claims is well-settled and is discussed in detail in this order. Petitioner's ability to succeed on the claim will rest entirely upon the facts presented on a motion for summary judgment or at trial. With regard to the facts, petitioner has not shown that he is incapable of undertaking discovery as provided in the Federal Rules of Civil Procedure to obtain documentation supporting his claim. Petitioner's motion for the appointment of counsel will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Diego Gil's request for leave to proceed in forma pauperis on his claims under the Federal Tort Claims Act against respondent United States of America and under the Eighth Amendment against respondents James Reed and Jaime Penaflor is GRANTED.

2. Petitioner's request for leave to proceed in forma pauperis on his claim under the Eighth Amendment against respondents Mohammad Aslam and Nestor Osorio is DENIED for

his failure to state a claim upon which relief may be granted.

3. The unpaid balance of petitioner's filing fee is $100; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

4. Respondents Mohammad Aslam and Nestor Osorio are dismissed from this case.

5. Service of this complaint will be made promptly after petitioner submits to the clerk of court three copies of his complaint, four completed marshals service forms and five completed summonses, one for each individual respondent, one for the United States Attorney for the Western District of Wisconsin, one for the Attorney General in Washington, D.C. and one for the court. Enclosed with a copy of this order are sets of the necessary forms. If petitioner fails to submit the completed marshals service and summons forms before January 9, 2001, his complaint will be subject to dismissal for failure to prosecute.

6. In addition, petitioner should be aware of the requirement that he send the United States Attorney in this district a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the specific lawyer or lawyers in the United States Attorney's office who will be representing respondents, he should serve the lawyer directly. Petitioner should retain a copy of all documents for his own files. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents' attorney.

Entered this 21st day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge