

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

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CARL BELETSKY,

Plaintiff,

v.

JON LITSCHER, Secretary, Wisconsin  
Department of Corrections; STEPHEN  
PUCKETT, Director Offender Classification,  
Wisconsin Department of Corrections; and  
THOMAS G. BORGAN, Warden, Fox Lake  
Correctional Institution,

Defendants.

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ORDER

01-C-4-C

This is a proposed civil action for injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff is presently confined at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. He has paid the full fee for filing his complaint. However, because he is a prisoner and defendants are “employee[s] of a governmental entity,” this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A(a), (b). Subject matter jurisdiction is

present. See 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, 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 plaintiff's case sua sponte for lack of administrative exhaustion, if defendants can prove that plaintiff 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).

Plaintiff contends that defendants have indicated that he may be transferred to an out-of-state prison where he would be unable to receive on-site counseling for post traumatic stress disorder. Plaintiff argues that such a transfer would violate his rights under the Eighth Amendment, the Americans with Disabilities Act, the Rehabilitation Act and Wis. Stat. § 51.61(1)(f).

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

#### ALLEGATIONS OF FACT

The Wisconsin Department of Corrections is trying to transfer plaintiff to an out-of-state private prison pursuant to Wis. Stat. 301.21. After seeing plaintiff, the program review committee at Fox Lake Correctional Institution recommended that plaintiff be transferred to an out-of-state private prison owned and operated by Corrections Corporation of America.

Plaintiff is participating in a federally structured post traumatic stress disorder treatment counseling program through the Madison Wisconsin Veteran's Center. The counseling sessions provide ongoing treatment by examining complex issues extending from plaintiff's childhood through military service. Corrections Corporation of America prisons do not provide post traumatic stress disorder on-site treatment. The threat that plaintiff will be transferred to an out-of-state prison has already caused him to suffer psychological trauma.

#### DISCUSSION

Plaintiff requests that this court enter a temporary restraining order or preliminary injunction against his transfer to an out-of-state prison during the pendency of this action. Plaintiff challenges the legality of his transfer, arguing that because he is presently participating

in a post traumatic stress disorder treatment program, his transfer to a prison that does not provide such treatment would violate the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796, and his right to adequate medical treatment under the Eighth Amendment. I note initially that plaintiff has not yet been transferred out of state and the only injury he has alleged is that “threatening to send him Out-of-State has already re-traumatized petitioner with discrimination upon his psychological disability.” Cpt. at 3. However, plaintiff’s allegation that the Wisconsin Department of Corrections is presently trying to transfer plaintiff suggests that his injury of being transferred is sufficiently imminent to confer Article III jurisdiction over his complaint.

"A prisoner has no due process right to be housed in any particular facility." Whitford v. Boglino, 63 F.3d 527, 532 (7th Cir. 1995); see also Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (prisoner has no legally protected interest "in [his] keeper's identity"). In Pischke, the court of appeals concluded that the housing of Wisconsin prisoners with private prisons in other states did not violate the Thirteenth Amendment. See Pischke, 178 F.3d at 500. In addition, the court stated that it could not “think of any other provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government.” Id. Plaintiff’s case is unlike the usual one. He contends that his transfer will be illegal because an out-of-state prison will

not provide him on-site access to a program for post traumatic stress disorder that will provide him the counseling he is receiving in Wisconsin.

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).

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).

Plaintiff alleges that Corrections Corporation of America prisons do not provide structured treatment counseling for post traumatic stress disorder on site. However, he has not alleged that he will not receive any treatment if he is transferred. In fact, the program review committee comments in plaintiff's inmate classification summary note, "[Plaintiff] indicated that he has on-going medical concerns that are being addressed at [Fox Lake Correctional Institution health services unit]. Contact will be made w/ [health services unit] to confirm that these medical needs can be met at an out of state facility." Cpt. Ex. A at 2. This excerpt suggests that even if defendants do transfer plaintiff, such transfer would not be made with deliberate indifference to plaintiff's medical needs. (I assume for purposes of this order that plaintiff's post traumatic stress disorder is a serious medical need.)

Even though petitioner may disagree with the course of treatment available at a Corrections Corporation of America facility, 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 is not entitled to whatever treatment he desires; he is entitled only to the level of treatment that meets the standards of the Eighth Amendment. He has not alleged that he will not receive any treatment at a Corrections Corporation of America facility.

Additionally, plaintiff fails to state a claim under the Americans with Disabilities Act or the Rehabilitation Act. Plaintiff cites sections of those acts that prohibit discrimination or define handicapped person. Plaintiff has failed to allege any facts that might suggest that he is being considered for transfer out-of-state because he has post traumatic stress disorder. Therefore, he has failed to state a claim for relief under those acts.

Normally, when a plaintiff has failed to state a claim for relief under federal law, I will decline to exercise supplemental jurisdiction over state law claims. Plaintiff believes he has a viable claim under Wis. Stat. § 51.61(1)(f). That section states that patients (which is not defined in such a way as to obviously include plaintiff)

Have a right to receive prompt and adequate treatment, rehabilitation and educational services appropriate for his or her condition, under programs, services and resources that the county board of supervisors is reasonably able to provide within the limits of available state and federal funds and of county funds required to be appropriated to match state funds.

Wis. Stat. § 51.61(1)(f). Because my analysis of plaintiff's claim under the Eighth Amendment indicates that plaintiff has not alleged facts suggesting that he will not receive prompt and

adequate treatment, it is appropriate to exercise supplemental jurisdiction over the state law claim and to dismiss it for failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. This action is DISMISSED pursuant to 28 U.S.C. § 1915A(b)(1) for plaintiff Carl Beletsky's failure to state a claim upon which relief may be granted under the Eighth Amendment, Americans with Disabilities Act, Rehabilitation Act or Wis. Stat. § 51.61(1)(f);

2. Plaintiff's motion for a temporary restraining order or a preliminary injunction is DENIED as moot;

3. A strike will be recorded against plaintiff pursuant to § 1915(g);

4. The clerk of court is directed to enter judgment for defendants and close the file.

Entered this 4th day of January, 2001.

BY THE COURT:

BARBARA B. CRABB  
District Judge