IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

BOBBY J. JOHNSON, JR.,

Petitioner,

v.

CATHERINE J. FARREY (Warden);
ROBERT HABLE (Security Director);
SGT. INGUM; CAPTAIN STITCH and
C/O BERNS,

Respondents.

ORDER

03-C-592-C

- -

This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Petitioner alleges that respondents violated his right to be free from cruel and unusual punishment under the Eighth Amendment when they failed to provide him with his asthma inhaler at the onset of an asthma attack he suffered while incarcerated at the Prairie du Chien Correctional Institution. From the financial affidavit petitioner has given the court, I conclude that he is unable to prepay the full fees and costs

of starting this lawsuit. Petitioner has made the initial partial payment required under § 1915(b)(1).

The 1996 Prison Litigation Reform Act requires the court to deny leave to proceed to a prisoner claimant if he has had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. 42 U.S.C. § 1915e. In performing that screening, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

At all relevant times, petitioner was an inmate incarcerated at the Prairie du Chien

Correctional Institution in Prairie du Chien, Wisconsin. At the Prairie du Chien facility, respondent Farrey is the warden, respondent Hable is the security director, respondent Ingum is a sergeant, respondent Stitch is a captain and respondent Berns is a correctional officer.

On May 5, 2003, at approximately 10:15 p.m., respondent Berns allowed petitioner and his three cell mates to leave their cell for a restroom break. At that time, petitioner began to experience shortness of breath as a result of asthma. He asked respondents Berns and Ingum for his inhaler. They refused his request, claiming that his inhaler prescription had expired. Petitioner repeated that he was having difficulty breathing and insisted that his prescription had not expired.

The restroom break ended at 10:30 p.m. Approximately 20 minutes later, one of petitioner's cell mates buzzed the prison staff through the P.A. system to report that petitioner was having an asthma attack. Although staff responded through the public address system, no one came to petitioner's cell to investigate the matter. At 11:00 p.m., petitioner's cell mate placed another call through the public address system to advise facility staff that petitioner's symptoms were getting worse and to ask them to inform a captain, sergeant or correctional officer. Respondent Ingum replied that Captain Stitch would not be coming.

At approximately 11:30 p.m., respondents Ingum and Berns came to petitioner's cell

door and observed petitioner having an asthma attack. They ordered petitioner's cell mates to vacate the cell. When one of the cell mates refused to leave until petitioner received medical treatment, respondent Ingum called Captain Stitch to inform him of the situation. Petitioner's cell mate vacated the cell as soon as Captain Stitch arrived and Stitch asked petitioner about his asthma attack. At approximately 11:45 p.m., respondent Ingum gave petitioner his inhaler. By this time, petitioner's attack had progressed too far for him to obtain relief from an inhaler. As the condition worsened, Captain Stitch ordered other correctional officers to move petitioner to another cell where respondent Berns watched him until an ambulance arrived between a half an hour and an hour later. Petitioner was taken to the emergency room at the Prairie du Chien Memorial Hospital.

During the time of his asthma attack, petitioner suffered from chest pain, hyperventilation, an anxiety attack, difficulty breathing and facial numbness.

OPINION

A. Respondents Farrey and Hable

Petitioner alleges that respondent Farrey was the warden of the Prairie du Chien facility at the time the alleged events took place and that respondent Hable was the security director. He does not allege that either of these respondents had any knowledge of the incident at the time it took place or that they were personally involved in denying petitioner

his inhaler in a timely fashion.

Liability under § 1983 must be based on a respondent's personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). The official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); see also Kelly v. Municipal Courts of Marion County, 97 F.3d 902, 908 (7th Cir. 1996). Nevertheless, in a § 1983 action, a supervising official cannot be sued for the acts of his subordinates. See Gentry, 65 F.3d at 561; Del Raine, 32 F. 3d at 1047; Wolf-Lillie, 699 F.2d at 869. Because petitioner has not alleged any facts to suggest that respondents Ferrey and Hable directed the other respondents to behave in the way they are alleged to have behaved on May 5, 2003, or that they knew about the incident at the time it was occurring and failed to intervene, these respondents will be dismissed from this lawsuit.

B. Respondents Stitch, Ingum and Berns

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 1) he had a serious medical need (objective component) and 2) that prison officials were deliberately indifferent to this need (subjective component). Id. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

The Court of Appeals for the Seventh Circuit has held that "serious medical needs" include 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. Gutierrez, 111 F.3d at 1371. Asthmatic attacks can be serious enough to meet the "serious medical needs" standard, Alvarado v. Litscher, 267 F.3d 648 (7th Cir. 2001), and petitioner has alleged that his asthmatic attack led to his hospitalization. These allegations are sufficient to satisfy the objective component for stating a claim under the Eighth Amendment.

With respect to the subjective component, 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 v. Brennan, 511 U.S. 825, 837 (1993). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91. 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. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Petitioner has alleged that respondents Ingum and Berns intentionally, maliciously and sadistically delayed providing him with his asthma inhaler until it was too late to avoid acute distress. The deliberate refusal to provide an inmate with prescribed medication can violate the Eighth Amendment. See, e.g., Walker v. Benjamin, 293 F.3d 1030, 1040 (7th Cir. 2002). Therefore, petitioner has alleged a viable legal claim against respondents Ingum and Berns and will be allowed to proceed against them.

Petitioner alleges that at 11:00 p.m., when his cell mates reported petitioner's condition over the P.A. and asked that the matter be reported to a captain, respondent Ingum responded that respondent Stitch was not coming to remedy the situation. A half an hour later, respondent Ingum called Captain Stitch to tell him that one of petitioner's cell mates refused to leave the cell until petitioner received medical treatment. At this point,

Stitch intervened, insuring petitioner's cell mate vacated the cell and asking petitioner about his asthma attack. Shortly thereafter, Ingum gave petitioner his inhaler and when it was apparent the inhaler was not helping petitioner, Stitch ordered other correctional officers to move petitioner to another cell where respondent Berns watched him until an ambulance arrived.

The requirement that an official be personally involved in the alleged deprivation in order for § 1983 liability to attach is satisfied "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith, 761 F.2d at 369.

There is no indication in petitioner's complaint that respondent Stitch was actually informed about petitioner's situation by the unit staff until 11:30 p.m., at which time Stitch responded to the situation and petitioner was given his inhaler and subsequently transported to a hospital. However, because of the liberal construction that courts must give to every pro se complaint, Haines, 404 U.S. at 521, I cannot say that respondent Stitch was not contacted and apprised of the serious nature of petitioner's condition before 11:30 p.m., and that he deliberately failed to intervene. Accordingly, petitioner will be allowed to proceed on his claim against respondent Stitch.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis against respondents Ingum, Berns and Stitch is GRANTED on his claim that these respondents were deliberately indifferent to his serious medical needs when they failed to respond promptly to his asthma attack in violation of his rights under the Eighth Amendment.

2. Petitioner's request for leave to proceed in forma pauperis against respondents Hable and Farrey is DENIED because petitioner has not alleged the personal involvement of these respondents in the alleged violation of his Eighth Amendment rights. Respondents Hable and Farrey are DISMISSED from this case.

3. For the remainder of this lawsuit, petitioner must send respondents Ingum, Berns and Stitch a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the respondents, he should serve the lawyer directly rather than respondents. The court will disregard documents petitioner submits that do not show on the court's copy that he has sent a copy to respondents or to respondents' attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. The unpaid balance of petitioner's filing fee is $146.410; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 14th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge