IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREGORY J. CARMODY,

ORDER

Petitioner,

03-C-61-C

v.

JOHN LITSCHER, CINDY O'DONNEL, SHARON ZUNKER, SANDY HAUTAMAKI, AMY FISHER, PHIL KINGSTON, TIM DOUMAS, GREG GRAMS, SGT. SCHNELLNER, MR. TOMAX, JANET LINDSCHEID, DR. BRIDGEWATER, MR. CASPERSON, and MS. SIEDSCHLAG,

Respondents.

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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 Columbia Correctional Institution in Portage, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 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. 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). 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).

In his complaint, petitioner alleges the following facts.[1]

ALLEGATIONS OF FACT

Petitioner Gregory J. Carmody is incarcerated at the Wisconsin Resource Center in Winnebago, Wisconsin. At all times relevant to this complaint, petitioner was incarcerated

[1]Petitioner followed up his complaint with several briefs asking the court to incorporate into his complaint the "case laws" he cited in them. Because it is not appropriate at this stage to discuss the law and because the cases he cited are largely irrelevant, I do not consider them as part of the complaint.

at the Columbia Correctional Institution in Portage, Wisconsin. Respondent John E. Litscher is Secretary of the Wisconsin Department of Corrections. Respondents Sandy Hautamaki and Cindy O'Donnel are corrections complaint examiners for the Wisconsin Department of Corrections. Respondent Amy Fischer is an institution complaint examiner for the Wisconsin Department of Corrections. Respondent Sharon Zunker is the supervisor for health care services for all Wisconsin inmates. Respondent Janet Lindscheid's position requires her to help inmates who experience crises. The remaining respondents are employed at the Columbia Correctional Institution. Phil Kingston is the warden. Greg Grams is the deputy warden. Tim Doumas is in charge of security at the prison. Sgt. Schneller and Mr. Tomax are correctional officers. Dr. Bridgewater is a doctor. Mr. Casperson is a nurse in the health services unit. Ms. Siedschlag is the supervisor of the health services unit.

Petitioner is a diabetic and needs periodic insulin injections. He has a history of severe mental illness that impairs his perception of reality. On April 1, 2002, petitioner was incarcerated in the segregation block. Diabetic inmates in the segregation block must inject themselves with insulin without the benefit of a blood sugar level reading or the nursing staff's supervision. Respondent Doumas was involved in creating the policy governing insulin injections in the segregation units and knew that the policy was dangerous and would subject petitioner to an excessive risk of harm to his health or life. Nonetheless, he failed to take corrective measures.

Respondent Bridgewater prescribed insulin for petitioner and supervised his treatment. Respondent Siedschlag supervises the prison health services unit. Both respondents knew that petitioner had a serious case of diabetes and that petitioner was housed in the segregation unit. Nevertheless, they provided petitioner with a type of insulin that is inherently dangerous when administered without an accurate blood sugar level reading. Respondents Bridgewater and Siedschlag also knew of petitioner's history of severe mental illness. Despite this knowledge, they took no steps to insure that petitioner's blood sugar level was tested before he injected himself with insulin. Because of this, petitioner had to guess what amount of insulin he needed before injecting himself.

On April 1, 2002, respondent Tomax gave petitioner a bottle of insulin with a syringe so that petitioner could inject insulin without first testing his blood sugar level. Shortly after he injected himself, petitioner lost consciousness.

When petitioner regained consciousness, he found himself handcuffed to a chair near the segregation unit's bubble. He was told that respondent Tomax had found him unconscious in his cell and had brought him to the chair. Respondents Schneller and Tomax left him in the chair for at least two hours before they contacted the nurse's station for treatment. During this time, petitioner's brain was deprived of adequate oxygen.

Respondent Casperson was eventually called to treat petitioner. He administered liquid glucose and gave petitioner a cheese sandwich to stabilize his blood sugar level.

However, no treatment was given to prevent further complications from the prolonged oxygen deprivation petitioner suffered.

Petitioner suffered the following complications as a result of the insulin reaction and the subsequent oxygen deprivation: inability to articulate his words and severe stuttering which lasted about a week; loss of motor control and normal body functions; and a profound and persistent state of confusion and deep anxiety. Petitioner also suffers from a loss of feeling or sensitivity in his extremities, which indicates damage to his organs, tissues and nerves. He still suffers severe depression over the incident.

On April 2, 2002, respondent Lindscheid saw petitioner but she cut short her visit and did nothing to insure that petitioner received further treatment for the insulin reaction.

On April 3, 2002, petitioner filed an inmate complaint concerning the insulin incident. On April 9, 2002, respondent Fisher recommended that the complaint be dismissed. On the basis of her recommendation, respondent Zunker dismissed the complaint. On April 13, 2002, petitioner appealed the disimissal. On May 2, respondent Hautamaki recommended dismissal. On the basis of Hautamaki's recommendation, respondent O'Donnel dismissed the appeal.

Respondents Kingston and Grams both knew that the insulin injection procedures in the segregation unit were improper. Even though they knew that the current insulin injection procedures posed substantial risks to petitioner's health and safety, they took no

corrective measures to abate the condition.

OPINION

Petitioner contends that the insulin injection policy for inmates in segregated confinement and the allegedly inadequate medical treatment he received constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court held in Estelle v. Gamble, 429 U.S. 97, 104-05 (1976), that deliberate indifference to prisoners' serious medial needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. To state a claim under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. In other words, 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 Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

A. Serious Medical Need

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 id. at 1371.

Petitioner is a diabetic who needs periodic insulin injections. According to petitioner, proper administration of his insulin is necessary to prevent an adverse insulin reaction and life-threatening complications. On April 1, 2002, petitioner allegedly lost consciousness after he was forced to inject prescribed insulin by himself without his blood sugar level being checked, pursuant to a policy applicable to segregation inmates. Once an insulin reaction occurs, a prompt response is needed to alleviate further complications. Petitioner alleges that no medical treatment was provided for at least two hours after he regained consciousness. Petitioner alleges that as a result he suffered complications including oxygen deprivation, organ and nerve damage, an inability to articulate his words, loss of basic body control and sensitivity in his extremities and anxiety and depression. Petitioner's allegations are sufficient to demonstrate that he had a serious medical need.

B. Deliberate Indifference

The subjective element of a claim of cruel and unusual punishment requires that the prison official act with a sufficiently culpable state of mind. See id. at 1369. A negligent or inadvertent failure to provide adequate medical care is insufficient because such a failure is not an "unnecessary and wanton infliction of pain" and is not "repugnant to the conscience

of mankind." Estelle, 429 U.S. at 105-06. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Id. at 106. However, the standard for deliberate indifference is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). "[A] prisoner claiming deliberate indifference need not prove that the prison officials intended, hoped for, or desired the harm that transpired." Id. It is enough to show that the defendants actually knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk. See id. "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Farmer v. Brennan, 511 U.S. 825, 842 (1994).

According to petitioner, respondent Bridgewater prescribed insulin for him that required a blood sugar test before injection even though Bridgewater knew that prison policies did not allow segregation inmates to test their blood sugar level before injecting themselves with insulin. Moreover, respondent Bridgewater allegedly knew that petitioner had a history of mental illness that impaired his ability to administer the treatment by himself. Petitioner alleges also that respondent Siedschlag was aware of these same facts and the danger they posed to petitioner but failed to intervene. Petitioner has alleged facts sufficient to state a claim that respondents Bridgewater and Siedschlag were deliberately indifferent to his serious medical needs. Petitioner will be allowed to proceed on his Eighth

Amendment claim against these respondents.

Petitioner alleges that when respondents Tomax and Schneller discovered that he was unconscious, they waited at least two hours before contacting the health services unit. Petitioner has alleged sufficient facts to indicate that respondents Tomax and Schneller were deliberately indifferent to his serious medical needs by failing to call for proper treatment promptly. Petitioner will be allowed to proceed against these respondents as well.

Petitioner alleges that respondent Casperson treated him with liquid glucose and a cheese sandwich to stabilize his blood sugar level but failed to treat him for brain tissue damage caused by prolonged oxygen deprivation from the insulin reaction. Petitioner claims several disabilities allegedly resulted from this incident including inability to articulate his words, loss of bodily control and a persistent state of confusion. However, petitioner does not allege that respondent Casperson was ever aware that he had suffered brain damage. Indeed, it is difficult to see how a nurse could diagnose on the spot the type of brain and organ damage petitioner describes in his complaint. Accordingly, petitioner will be denied leave to proceed against respondent Casperson.

Similarly, petitioner states no claim of constitutional wrongdoing against respondent Lindscheid. Petitioner asserts that respondent Lindscheid's job was to help prisoners with crises. According to petitioner, she saw him the day after he suffered the insulin reaction but cut short her visit with him. However, there is no indication that respondent Lindscheid

knew at that time that petitioner was still in need of medical treatment. Nor do the alleged facts indicate that Lindscheid was qualified to provide a medical diagnosis or treatment. Accordingly, petitioner will be denied leave to proceed against respondent Lindscheid.

Petitioner alleges that respondent Amy Fisher recommended that his inmate complaint be dismissed and that respondent Sharon Zunker dismissed the complaint. He also alleges that respondent Sandy Hautamaki recommended that his appeal be dismissed and that respondent Cindy O'Donnel dismissed the appeal. Although petitioner asserts that these respondents disregarded his safety, he fails to allege any causal connection between their acts and the alleged injuries he suffered. Moreover, petitioner alleges that these respondents rejected his inmate complaints because of false information provided by respondent Siedschlag, rather than as a result of their own deliberate indifference. Petitioner will not be allowed to proceed against respondents Fisher, Zunker, Hautamaki and O'Donnel.

Petitioner names Tim Doumas as a respondent. According to petitioner, Doumas is responsible for creating the "policies, customs, regulations and practices" governing insulin injections for segregation unit inmates. He alleges that respondent Doumas failed to insure that adequate safeguards existed to protect insulin-dependent segregation inmates, even though he knew that the prison's current practices were dangerous and would place petitioner's life and health in danger. Petitioner will be allowed proceed against respondent

Doumas.

Petitioner also names as respondents Phil Kingston and Greg Grams, the warden and deputy warden, respectively, at the Columbia Correctional Institution. He alleges that respondents Kingston and Grams knew of the lack of proper insulin injection policies in the segregation unit and the substantial danger to petitioner's health and safety that this situation created. He alleges that they failed to take any corrective measures despite their knowledge. Petitioner has alleged sufficient facts to proceed against respondents Kingston and Grams.

Finally, petitioner has named as a respondent John Litscher, the former Secretary of the Department of Corrections. However, petitioner fails to allege how respondent Litscher was involved in the alleged deprivation of his civil rights. For a supervisory official to be found liable under §1983, there must be a "causal connection, or an affirmative link, between the misconduct complained of and the official sued." Smith v. Rowe, 761 F.2d 360 at 369 (7th Cir. 1985) (citation omitted); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). The doctrine of responeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § 1983. See Polk County v. Dodson, 454 U.S. 312, 325 (1981). Thus, petitioner will not be allowed to proceed against respondent Litscher.

ORDER

IT IS ORDERED that

1. Petitioner Gregory J. Carmody's request for leave to proceed in forma pauperis against respondents Phil Kingston, Greg Grams, Sgt. Schneller, Mr. Tomax, Dr. Bridgewater, Tim Doumas and Ms. Siedschlag on his claim that they were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment is GRANTED.

2. Petitioner's request for leave to proceed in forma pauperis against respondents Janet Lindscheid, John Litscher, Cindy O'Donnel, Sharon Zunker, Sandy Hautamaki, Mr. Casperson and Amy Fisher is DENIED because his claims against these respondents are legally frivolous and these respondents are DISMISSED from this case.

3. 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 or lawyers who will be representing respondents, he should serve the lawyers 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 respondents or to respondents' lawyers; and

4. The unpaid balance of petitioner's filing fee is $127.06; petitioner is obligated to

pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 10th day of March, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge