IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHILDERIC MAXY,

Petitioner, ORDER

v. 03-C-624-C

JOHN DOE, JANE DOE,
MICHAEL WEISSENBERGER,
CAPT. HELGENSEN, OFFICERS
(Deputy Sheriff) and DOCTOR and
(Medical Staff); ALL NURSES
EMPLOYED AT THE TIME OF
INJURY,

Respondents.

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This is a civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Childeric Maxy, an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin, requests leave to proceed in forma pauperis under 28 U.S.C. § 1915. He alleges that respondents were deliberately indifferent to his serious medical needs and discriminated against him because of his race and national origin.

From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the 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, on three or more previous occasions, the prisoner has 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.

I conclude that petitioner has stated a claim upon which relief may be granted with respect to his claim that respondents violated his right to due process and equal protection when they denied his requests for medication. However, I will dismiss petitioner's claims that respondents violated his due process rights when they failed to provide him with a special diet, refused to allow him to lie down during the day, denied him a warm and cold pack and failed to monitor him as closely as suggested in his after care instructions because he has failed to state a claim upon which relief may be granted.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Childeric Maxy arrived at the La Crosse County jail around 5:30 a.m. on

February 27, 2000. The arresting officer provided the booking officer and the deputy sheriff with petitioner's "after care instructions." (As stated in case no. 03-C-623-C, another case filed by petitioner against different respondents, petitioner was at the hospital earlier that morning for lacerations on his head and neck.) These instructions provided that (1) additional treatment would be needed from a doctor; (2) petitioner should check with a doctor if he experienced dizziness, headaches, confusion, increased pain, difficulty seeing, swelling or loss of consciousness; and (3) petitioner should "eat simple foods, like soup, liquids;" (4) petitioner should be checked for symptoms every two hours. Petitioner was unable to stand during the booking process because he was so weak. Petitioner was taken to a cell, which included a mattress and blanket. Petitioner felt pain in his shoulders, neck, head and face. His scalp was still bleeding and he still had dried up blood on his face and around his eyes and ears.

Petitioner was given cereal and milk for breakfast. He could not open his mouth wide enough to eat the cereal. He drank the milk, though this resulted in painful stinging because of the cuts in his mouth. Petitioner was not given soup. Instead, he was given the same food as all the other inmates. The only liquids he received were milk and a small glass of juice in the morning.

The following day, a prison guard escorted petitioner out of his cell to Unit F, where pre-trial detainees are held during the day. Petitioner told the guard that he needed to see

a doctor or a nurse. The guard told petitioner that he would see a nurse at lunchtime. When petitioner told the guard that he needed to lie down because he was experiencing vertigo, the guard told him he could not lie down where he was going. The guard told him that he would have to seek approval from the sergeant to lie down during the day. (There is a policy at the jail that prohibits inmates from remaining in their cells during the day.) The guard saw the blood on petitioner's clothes; petitioner told the guard that the sutures in his head were bleeding.

There was nowhere that petitioner could lie down in Unit F except on the floor. He was afraid to lie down there because it was so dirty that there was a risk that his cuts would become infected. He sat down on a stool and leaned against a table.

When the nurse came, (petitioner identifies her first name as Holly), petitioner asked for a pain killer such as aspirin or ibuprofen to relieve his headache and the pain from his swollen face and in the back of his head. The nurse told petitioner that only the doctor had authority to prescribe pain killers. When petitioner asked to see the doctor, the nurse told him that the doctor was not on the premises. When he asked whether he could lie down, she told him that the doctor must authorize that as well. In the days that followed, other nurses that saw petitioner, such as Eddie and Sue, gave him a similar response. Sometimes, petitioner was told to fill out a medical request, but his requests either were not delivered or were ignored by the doctor. Petitioner was not seen by a doctor for at least a month.

None of the nurses checked petitioner's "after-care instructions" from the hospital. Petitioner does not know whether any of the medical staff received a copy of the instructions.

Repeatedly, petitioner asked respondents Captain Helgensen and Michael Weisenberger (the sheriff) as well as various shift sergeants for pain killers and to be moved so that he could lie down during the day. Petitioner's requests were denied. He was never given permission to lie down during the day.

Petitioner experienced great pain as a result of not receiving pain medication. His vertigo was so extreme that he could not stand up. He still suffers from headaches, vertigo and deteriorating vision.

Petitioner was denied medication because of his race and national origin. (He is a black Haitian.) White inmates who needed medication received it.

On March 8, 2000, petitioner returned to the hospital to have the sutures removed from the back of his head. However, no one at the hospital asked him any questions. He was afraid to complain in front of the police officers. The doctor prescribed an ice pack and a warm pack for petitioner. He never received either.

Petitioner did not see the doctor at the jail until weeks later. The doctor told him that he did not know what to do.

DISCUSSION

A. Failure to Provide Adequate Medical Care

I understand petitioner to contend that officials at the La Crosse County jail subjected him to punishment in violation of the due process clause of the Fourteenth Amendment by failing to provide him with adequate medical treatment. Because petitioner was a pre-trial detainee when the events giving rising to this lawsuit took place, the Eighth Amendment's prohibition on "cruel and unusual punishment" does not apply. "[T]he state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977). It is the due process clause of the Fourteenth Amendment that protects individuals in custody that have not yet been convicted. Cavalieri v. Shepard, 321 F.3d 616, 620 (7th Cir. 2003); see also Collins v. City of Harker Heights, 503 U.S. 115, 127-28 (1992) (due process clause "requires that conditions of confinement satisfy certain minimum standards for pretrial detainees, for people in mental institutions, for convicted felons, and for persons under arrest").

The Supreme Court has stated that the due process clause provides protections to pre-trial detainees that are "at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983). However, in practice, there is little difference between the protections provided

under the Eighth Amendment and the due process clause of the Fourteenth Amendment. When reviewing prison conditions of pretrial detainees, the Court of Appeals for the Seventh Circuit has applied the same standard as it does for convicted prisoners: whether state officials were deliberately indifferent to a substantial risk of serious harm. E.g., Washington v. LaPorte County Sheriff's Dept, 306 F.3d 515, 517 (7th Cir. 2002); Chapman v. Keltner, 241 F.3d 842, 845 (7th Cir. 2001); Weiss v. Cooley, 230 F.3d 1027, 1032 (7th Cir. 2000).

When the alleged risk to a detainee involves a medical condition, he must prove that his medical need is " one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir.1997); see also id. (medical condition is sufficiently serious if "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.") To demonstrate "deliberate indifference," petitioner must show actual knowledge by the officials of the existence of a substantial risk of harm and that the officials had considered the possibility that the risk could cause serious harm. Farmer v. Brennan, 511 U.S. 825, 837 (1994). Ordinary negligence by prison officials is not enough to show an Eighth Amendment violation. Sellers v. Henman, 41 F.3d 1100, 1102 (7th Cir.1994); see also Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir.1996) ("Mere negligence or even gross negligence does not constitute deliberate indifference."). Prison officials "must both be aware

of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference." Farmer, 511 U.S. at 838. Farmer's standard does not require actual knowledge of an individualized threat---"it is enough that defendants are aware that their action may cause injury without being able to divine the most likely victim." Delaney v. De Tella, 256 F.3d 679, 686 (7th Cir. 2001); Farmer, 511 U.S. at 843.

Petitioner identifies five conditions that violated his due process rights: (1) he was given the same food as other inmates; (2) he was unable to lie down in bed during the day; (3) he did not receive an ice pack or warm park as prescribed by the doctor at the hospital; (4) he received no pain medication for his injuries despite repeated requests to jail staff; and (5) his condition was not monitored as provided in his after care instructions.

1. Special diet

With respect to petitioner's claim of inadequate food, the Court of Appeals for the Seventh Circuit has held there are some instances in which a prison's failure to provide an inmate with a special diet may violate the Constitution. Sellers, 41 F.3d at 1102. However, in Sellers, the inmate was a diabetic; a failure to provide him with a diet that was both low in fat and sufficiently high in calories could have had serious adverse effects on the inmate's health. Id. In this case, petitioner did not have a condition that would make a standard diet

unhealthful for him; petitioner's after care instructions did not indicate that a special diet was medically required. Rather, eating solid foods was more difficult for petitioner because his mouth was swollen and he had difficulty opening it. Petitioner admits that he was given nutritious liquids to drink such as juice and milk. Although petitioner states that he wanted more variety than juice and milk alone, the Constitution does not entitle him to receive the diet of his choice. Lunsford v. Bennett, 17 F.3d 1574, 1580 (7th Cir. 1994). Taking into consideration the limited duration of petitioner's restrictions (there is no indication in petitioner's complaint that his mouth remained swollen for an extended period of time), I cannot conclude that respondents violated his due process rights by failing to provide him with more liquid food options, particularly when he does not allege that he told any of the officials that he could not eat solid foods. Because there are no allegations in his complaint to suggest that his health was threatened by not receiving a special diet or that respondents were deliberately indifferent to a threat to his health, this claim will be dismissed for failure to state a claim upon which relief may be granted.

2. Inability to lie down

Petitioner's allegation that he was unable to lie down during the day also fails to state a claim under the due process clause. He does not allege that a doctor ordered him to remain in bed during the day. His instructions from the hospital stated only that he should

rest quietly *for a day*. Petitioner admits that he was allowed to lie down in the evenings and sit down during the day. He was not required to stand for long periods of time or engage in any strenuous activity. Thus, respondents did not interfere with petitioner's prescribed treatment. Petitioner does allege that he often experienced vertigo when standing, but, again, he was not required to stand. He could sit down on a stool or on the floor. Accordingly, I conclude that petitioner's allegations do not permit the drawing of a reasonable inference that he had a serious medical need requiring him to lie down during the day. This claim will be dismissed for failure to state a claim upon which relief may be granted.

3. Warm pack and ice pack

With respect to petitioner's allegation that he was denied his doctor prescribed ice pack and warm pack, the Supreme Court and the court of appeals have held that intentional interference with prescribed treatment can violate the Constitution. Estelle v. Gamble, 429 U.S. 97, 105 (1976); Zentmyer v. Kendall County, 220 F.3d 805, 812 (7th Cir. 2000). However, petitioner's complaint contains no allegations from which it could be reasonably inferred that he had a serious medical need for a warm pack or ice pack or that anyone at the jail intentionally refused to provide him with one. He does not allege that not having a warm pack or ice pack caused any adverse effects to his health. In addition, he does not

allege that he *asked* anyone at the jail for such an accommodation or that either he or anyone at the hospital informed prison staff that a warm pack or ice pack was a medical necessity. Tesch v. County of Green Lake, 157 F.3d 465, 476 (7th Cir. 1998) (no deliberate indifference when risk of harm was not obvious and plaintiff did not inform jailers of needs). Accordingly, this claim must be dismissed.

4. Pain medication

Next, petitioner alleges that he repeatedly requested a pain reliever, but respondents denied his requests. He did not see the jail doctor at all until he had been in jail more than a month. Severe pain can constitute a severe medical need and the refusal to provide pain medication can show deliberate indifference to the detainee's health and safety. Walker v. Benjamin, 293 F. 1030 (7th Cir. 2002); see also Harris v. Hegmann, 198 F.3d 153, 159-60 (5th Cir. 1999) (prisoner stated claim for cruel and unusual punishment when he alleged that defendants repeatedly ignored complaints of pain); Murphy v. Walker, 51 F.3d 714, 720 (7th Cir. 1995) (prisoner stated claim under Eighth Amendment by alleging that defendants denied him pain relievers after he broke his hand); Boretti v. Wiscomb, 930 F.2d 1150, 1154 (6th Cir. 1991) (plaintiff showed issue of fact on Eighth Amendment claim by averring that defendants had refused to give him pain medication or otherwise treat his wounds for five days). At this stage of the proceedings, I will assume that petitioner's level

of pain was sufficiently severe to constitute a serious medical need.

The question on this claim is who the proper respondents are. Petitioner alleges that he complained about his pain to respondent Michael Weissenberger (the sheriff), respondent Helgensen and various unnamed shift sergeants and nurses. In addition, he alleges that he filled out medical requests for the doctor but these were either ignored by the doctor or not delivered. An official may be held liable for a constitutional violation if he or she knew about the conduct and facilitated it, approved it, condoned it, or turned a blind eye for fear of what he might see. Morfin v. City of East Chicago, 349 F.3d 989 (7th Cir. 2003). A nurse who has no authority to prescribe medicine would not necessarily satisfy this standard when he or she told petitioner that he must seek treatment from the doctor. However, at this point, I will assume that each of the individuals from which petitioner sought aid either had the authority to provide him with medication or at least could have insured that the doctor was aware of petitioner's condition but failed to do so.

With the exceptions of respondents Weissenberger and Helgensen, petitioner failed to name any of the individuals who denied his requests for medication. However,"when the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir. 1996); see also Duncan v. Duckworth, 644

F.2d 653, 655-56 (7th Cir. 1981) (if prisoner does not know name of defendant, court may allow him to proceed against administrator for purpose of determining defendants' identity). Accordingly, petitioner will be granted leave to proceed against respondents Weissenberger and Helgensen individually and for the purpose of discovering the names of the other individuals who are allegedly responsible for denying him pain medication. Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which petitioner is to amend his complaint to include the unnamed defendants.

5. Failure to monitor petitioner's condition

Finally, I understand petitioner to contend that respondents were deliberately indifferent to his serious medical needs when they failed to monitor him as closely as provided in his after care instructions, which stated that he should be checked for symptoms every two hours and that additional treatment would be needed from a doctor. Accepting petitioner's allegations as true as I must, I assume that these instructions were not followed by jail staff. However, not every failure to comply with a doctor's instructions amounts to deliberate indifference to a serious medical need. The Court of Appeals for the Seventh Circuit has held that failing to follow a doctor's prescription constitutes deliberate

indifference only when the officials know that disregarding it could impose a substantial risk of serious harm on the detainee. Zentmeyer, 220 F.3d at 811-12; see also Mathis v. Fairman, 120 F.3d 88, 92 (7th Cir. 1997) (no liability for detainee's suicide when there was "no evidence that his behavior changed in a way that made the jail staff aware that he might harm himself").

In this case, petitioner's allegations do not suggest that he exhibited any signs of needing constant monitoring when he arrived at the jail or that he would be unable to call for help if he needed it. Although he does allege that some of his wounds were still bleeding the following day, he also admits that he was seen by a nurse shortly after he complained to the guard. Further, by the time he talked to the nurse, he apparently had forgotten about any bleeding; his only complaints to the nurse were being unable to lie down and not receiving medication, both of which I have addressed above. Although the care provided for petitioner may not have been ideal, he admits that he was seen by several nurses and that he was returned to the hospital ten days after his booking to have his sutures removed. Accordingly, I conclude that petitioner's allegations that he was monitored insufficiently do not state a claim upon which relief may be granted.

B. Equal Protection

Petitioner alleges that he was denied medication because he is a black Haitian and

that white detainees with ailments were given the medication that they needed. This allegation would not be sufficient by itself to prove a claim of discrimination based on race or national origin. See Minority Police Officers Association v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986) ("We have previously stated that the conclusory allegations of generalized racial bias do not establish discriminatory intent.") However, in order to state a claim, the complaint does not need to contain "all of the facts that will be necessary to prevail." Hoskins v. Poelestra, 320 F.3d 761, 764 (7th Cir. 2003). Under Fed. R. Civ. P. 8, the "plaintiff is not required to plead facts or legal theories or cases or statutes, but merely to describe his claim briefly and simply." Shah v. Inter-Continental Hotel Chicago Operating Corp., 314 F.3d 278, 282 (7th Cir. 2002); see also Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002) ("[T]here is no requirement in federal suits of pleading the facts or the elements of a claim."). So long as the complaint gives the defendant sufficient notice of the claim to file an answer, it "cannot be dismissed on the ground that it is conclusory or fails to allege facts." Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002).

In this case, petitioner has identified the discriminatory act (refusing to provide pain medication) and the basis for the discriminatory treatment (his status as a black Haitian). This is sufficient to state a claim. Antonelli v. Sheehan, 81 F.3d 1422, 1433 (7th Cir. 1996) (because plaintiff "suggests discriminatory motives impelled discriminatory treatment of him, he has stated an equal protection claim."). However, I emphasize that petitioner will

need much more evidence to succeed on his claim. If petitioner chooses to rest on the allegations in his complaint, this claim will not survive a motion for summary judgment. Accordingly, I will allow petitioner to proceed on his claim that respondents Weissenberger and Helgensen as well as the unnamed shift sergeants, nurses and doctor denied petitioner's requests for medication because of his race and national origin.

ORDER

IT IS ORDERED that

1. Petitioner Childeric Maxy is GRANTED leave to proceed under 28 U.S.C. § 1915 on his claims that respondents Michael Weissenberger, Captain Helgensen and as yet to be named shift sergeants, nurses and jail doctor violated his rights to due process and equal protection when they denied his requests for pain medication.

2. Petitioner's claims that respondents violated his right to due process by failing to provide him with a special diet, refusing to allow him to lie down during the day, denying him a warm and cold pack and failing to monitor him as closely as suggested in his after care instructions are DISMISSED for failure to state a claim upon which relief may granted.

3. The unpaid balance of petitioner's filing fee is $ 134.44; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

4. Because petitioner has included the address of respondents Weissenberger and

Helgensen with his complaint, the clerk of court will forward completed Marshals Service and summons forms to the U.S. Marshals, who will serve petitioner's complaint on respondents Weissenberger and Helgensen at the address petitioner provided. For the remainder of this lawsuit, petitioner must send respondents 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 petitioner has sent a copy to respondents or respondents' attorney.

5. 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.

Entered this 9th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge