

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

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JOHN GREGORY DAHLK,

Petitioner,

v.

DANIEL BERTRAND, SARAH VANCALSTER,  
KATHY LEMENS, JEANANNE HERTEL,  
STEPHEN PUCKETT,

Respondents.  
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ORDER

03-C-113-C

This is a proposed civil action for monetary and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Green Bay Correctional Institution in Green Bay, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner provided the court, I concluded that petitioner was unable to prepay the full fees and costs of starting this lawsuit. Petitioner made the initial partial payment required under § 1915(b)(1) and has since paid the full filing fee.

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.

#### ALLEGATIONS OF FACT

Petitioner is a Wisconsin inmate currently incarcerated at the Green Bay Correctional Institution in Green Bay, Wisconsin. Respondent Daniel Bertrand is the warden at the Green Bay Correctional Institution, where respondents Sarah VanCalster and Kathy Lemens are nurses. Respondent Jeananne Hertel manages the health services unit at the Green Bay prison. Respondent Stephen Puckett works for the Wisconsin Department of Corrections.

On April 6, 2002, respondent VanCalster neglected to bring petitioner his prescribed muscle relaxer during normal medication rounds. Respondent VanCalster returned with petitioner's medication but disregarded prison policy by giving the medication directly to the security staff to administer to petitioner.

On April 7, 2002, respondent VanCalster again neglected to bring petitioner's muscle relaxer medication during medication rounds. Respondent VanCalster later returned with an envelope containing a medication other than that prescribed by the prison doctor and again ignored prison policy by giving the medication to a correctional officer to administer. Petitioner returned the unidentified medication to a prison sergeant, explaining that it was not the medication he had been prescribed. The sergeant called respondent VanCalster, who refused to deliver the appropriate medication. The sergeant recorded respondent VanCalster's response in a prison log book. Petitioner filed an inmate complaint regarding this incident that was eventually dismissed by respondent Bertrand and subsequently by a corrections complaint examiner, who relied on false information provided by Bertrand.

On June 13, 2002, petitioner submitted a medical request slip requesting a refill of his medication for gastric pain and acid reflux on the basis of a recommendation by Stephanie Sequin, a prison nurse. On June 20, 2002, Sequin told plaintiff that respondent Lemens was not going to send plaintiff the medication he requested. On June 21, 2002, plaintiff asked a guard to contact the health services unit to find out why he was being denied his

medication. The guard told petitioner that respondent Lemens said she would not deliver medication to petitioner because she had delivered it to him on June 7, 2002. Petitioner proved that this was untrue by having the correctional officer who was on duty when the medication was allegedly delivered verify that no medication had been delivered. Petitioner had a family member, Jean Dahlk, contact respondents Bertrand and Puckett to tell them about respondent Lemens's actions and how they could be interpreted as retaliation for the complaint he had filed against respondent VanCalster. Petitioner had Jean Dahlk ask respondent Puckett to transfer him to an institution where he would be assured fair and adequate medical attention without the fear of retaliation. Petitioner finally received his medication for gastric pain and acid reflux after enduring nine days of pain as a result of respondent Lemens's actions.

On July 30, 2002, petitioner had Jean Dahlk contact respondent Puckett again to request a transfer to a prison where he would be assured fair and adequate medical attention. Respondent Puckett told Dahlk that petitioner would not be transferred.

On November 23, 2002, petitioner submitted a dental request for care of a broken tooth but no action was taken to fix the tooth or alleviate petitioner's pain for nine months. On March 7, 2002, respondent Hertel rejected a doctor's order that petitioner should have a procedure done that would have allowed the doctor to better diagnose and treat petitioner's gastric pain and acid reflux. On April 4, 2002, a doctor ordered that an extra pillow be issued

to petitioner to help curb his acid reflux pain, but the order was never fulfilled.

On April 5, 2002, the health services unit was faxed a level one advisory regarding a possible reaction between petitioner's asthma inhaler and his muscle relaxer medication. On April 11, 2002, the health services unit cancelled the muscle relaxer even though the fax had been sent six days earlier. The fax arrived three days after petitioner had filed his complaint about respondent VanCalster's refusal to deliver him his muscle relaxer.

On December 13, 2002, petitioner submitted a refill request for his gastric pain and acid reflux medication. On December 20, 2002, petitioner submitted a second request for the medication, stating that he had no more medication and desperately needed it for pain. On or about December 21, defendant Bertrand was notified that health services unit staff had let petitioner's medication lapse again, causing petitioner pain. The lapse was said to be because health services unit records showed that petitioner had been given his medication on December 15, 2002.

#### OPINION

I understand petitioner to allege several discrete violations of his Eighth Amendment right to receive adequate medical care while incarcerated. 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). Id. at 104; 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. Gutierrez, 111 F.3d at 1371. 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 alleges that on April 6, 2002, respondent VanCalster failed to bring him his muscle relaxer medication during her normal rounds and that when she brought it back later, she inappropriately gave it to a guard to administer to him. In addition, petitioner alleges that on the following day respondent VanCalster failed to bring him his medication during her normal rounds, later returned with an incorrect medication and refused to provide him with the correct medication that day. Because “an isolated occasion or two where [an inmate does] not receive prompt treatment” does not rise to the level of a constitutional violation, these allegations do not implicate the Eighth Amendment. Gutierrez, 111 F.3d at 1374.

Next, petitioner alleges that in June 2002, respondent Lemens intentionally delayed refilling petitioner’s prescription for medication to treat gastric pain and acid reflux for nine days, causing plaintiff to endure pain. 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). In addition, petitioner alleges that respondent Lemens’s actions were in retaliation for a complaint petitioner filed against respondent VanCalster regarding the timely delivery of his muscle relaxer medication. Prison officials may not retaliate against inmates for the exercise of a constitutional right, such as petitioning for the redress of grievances or seeking access to the court by using a prison’s administrative complaint system. See Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002); DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000); Babcock v. White, 102 F.3d 267, 275 (7th Cir.

1996). “This is so even if the [retaliatory] action does not independently violate the Constitution.” DeWalt, 224 F.3d at 618. Although petitioner’s complaint contains factual allegations suggesting that the delay in refilling his prescription might have been the result of a clerical mix up, at this stage of the proceedings I must assume the truth of petitioner’s allegations regarding respondent Lemens’s retaliatory motive. Therefore, I find that petitioner has stated an Eighth Amendment claim against respondent Lemens for deliberate indifference to his serious medical needs, as well as a First Amendment claim that respondent Lemens retaliated against him for filing an inmate complaint.

Petitioner also alleges that a relative informed respondents Puckett and Bertrand of his allegations and that therefore they were also deliberately indifferent to his medical needs. However, the chronology of events described in plaintiff’s complaint suggests otherwise. Petitioner alleges that he requested a refill of his medication on June 13, 2002, and that he went without medication for a total of nine days. This suggests he received his medication on or about June 22, 2002. According to petitioner, he contacted respondents Bertrand and Puckett on June 21, 2002, one day before he received his medication. This chronology hardly suggests that respondents Bertrand and Puckett were deliberately indifferent to petitioner’s medical needs. Indeed, it suggests the opposite. Accordingly, petitioner has pleaded himself out of court with respect to his claims against respondents Bertrand and Puckett. In addition, to the extent petitioner alleges that respondent Puckett was constitutionally



obligated to transfer him to a prison where he could be assured “fair and adequate medical attention,” his claim is legally frivolous.

In his complaint, petitioner also describes four other incidents that he labels “other facts supporting deliberate indifference.” Cpt. at 7-9. In particular, petitioner alleges that (1) he had to wait nine months to have a painful broken tooth fixed; (2) he was never given an extra pillow ordered for him by a doctor; (3) another prescription for acid reflux medication went unfilled for a period of time in December 2002; and (4) his muscle relaxer medication was not cancelled for six days after the prison health services unit received an advisory regarding a possible negative reaction between his asthma inhaler and the medication. Construing petitioner’s complaint liberally, it is conceivable that each of these actions might violate the Eighth Amendment if they were taken in deliberate disregard of petitioner’s serious medical needs. However, all of these allegations have one thing in common: petitioner fails to link them to any of the named respondents. Therefore, petitioner will be allowed to proceed on these claims against only respondent Hertel, who is in charge of the prison’s health services unit. If respondent Hertel was not personally responsible for these actions, she may know who was. If that is the case, petitioner can proceed against respondent Hertel in order to conduct formal discovery to learn the names of the persons directly responsible for allegedly violating his constitutional rights. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (court should not dismiss pro se

complaint against a defendant high official for lack of personal involvement when claim involves conditions or practices which, if they existed, would likely be known to higher officials or if petitioner is unlikely to know the person or persons directly responsible absent formal discovery). If petitioner discovers that someone other than respondent Hertel was responsible for the alleged constitutional deprivations, petitioner will have to amend his complaint to add specific allegations against that person or persons and then serve them with the amended complaint.

Petitioner also alleges that respondent Hertel countermanded another doctor's recommendation that petitioner receive a particular medical diagnostic procedure. However, "[m]ere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." Estate of Cole v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996) (noting that question whether particular diagnostic technique is indicated does not implicate Eighth Amendment); Snipes, 95 F.3d at 591 (7th Cir. 1996) (decision "whether one course of treatment is preferable to another" is "beyond the [Eighth] Amendment's purview"). Petitioner will be denied leave to proceed against respondent Hertel on this claim.

## ORDER

IT IS ORDERED that

1. Petitioner John Gregory Dahlk is GRANTED leave to proceed in forma pauperis on his claim that respondent Lemens was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment and retaliated against him for filing an inmate complaint in violation of the First Amendment by intentionally delaying a refill of his prescription medication for gastric pain and acid reflux for nine days in June 2002. Petitioner is DENIED leave to proceed on this claim against respondents Bertrand and Puckett.

2. Petitioner is GRANTED leave to proceed in forma pauperis on his Eighth Amendment claims that (1) he had to wait nine months to have a broken tooth fixed; (2) he was never given an extra pillow ordered for him by a doctor; (3) one of his prescriptions went unfilled for a period of time in December 2002; and(4) his muscle relaxer medication was not cancelled for six days after the prison health services unit received an advisory regarding a possible negative reaction between his asthma inhaler and the medication. Petitioner may proceed against respondent Hertel on these claims.

3. Petitioner is DENIED leave to proceed in forma pauperis on his claim that respondent VanCalster was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment when she failed to properly deliver his muscle relaxer medication on two occasions in April, 2002; this claim is legally frivolous.

4. Petitioner's is DENIED leave to proceed in forma pauperis on his claim that respondent Hertel was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment when she rejected another doctor's recommendation that petitioner receive a particular medical diagnostic procedure for petitioner's failure to state a claim upon which relief may be granted.

5. Petitioner should be aware of the requirement that he send respondent a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondent, he should serve the lawyer directly rather than respondent. 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 respondent or to respondent's attorney.

Entered this 12th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge