

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

ANDREW S. SATO
A.K.A. TIMOTHY TIKKURI,

Petitioner,

ORDER

v.

03-C-0185-C

SHERIFF DAVID CLARKE and
DAVID "DOE" (LAST NAME UNKNOWN R.N.)
at the Milwaukee County Jail,

Respondents.

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Andrew Sato, a prisoner at the Milwaukee County jail in Milwaukee, Wisconsin, alleges that he failed to receive prompt medical attention for a fractured wrist.

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, the prisoner's complaint must be dismissed if, even under a liberal construction, it 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. See 42 U.S.C. § 1915e. Although this court will not dismiss petitioner's case on its own for lack of administrative exhaustion, if

respondents can prove 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 and attachments, petitioner makes the following material allegations of fact.

ALLEGATIONS OF FACT

Petitioner Andrew Sato is a prisoner at the Milwaukee County jail in Milwaukee, Wisconsin. Respondent Sheriff David Clark is sheriff and respondent David “Doe” is a registered nurse at the jail.

At 3:00 p.m. on September 5, 2001, petitioner fell and hurt his wrist while getting out of the top bunk bed in his cell. Petitioner notified the nurse on duty that he had injured his wrist but the nurse responded that his injury was a not a medical emergency.

On September 6, 2001, petitioner woke up and was unable to move his fingers. Petitioner notified the nurse on duty and was told once again that his injury was not a medical emergency. The nurse gave petitioner a medical slip to complete, but failed to provide any medical care. Petitioner made repeated requests for medical treatment and no action was taken by any agents or employees of the jail.

On September 17, 2001, a doctor examined petitioner. The doctor concluded that petitioner had fractured his wrist and scheduled an x-ray for the following day.

On September 18, 2001, petitioner had an x-ray taken and was diagnosed as having a wrist fracture. Petitioner was provided with ice.

On September 27, 2001, petitioner was taken to a hospital and a cast was placed on his wrist. He was instructed to return to the hospital in three weeks. On November 19, 2001, petitioner was examined again at the hospital. The examination revealed that he still had a fracture and that surgery might be necessary.

On December 20, 2001, petitioner was taken to a different hospital for a bone scan and a radiological evaluation. At this visit he was informed that there was an abnormality in his left wrist, abnormal bone uptake, a decrease in blood flow and that the possibility for surgery was high.

DISCUSSION

I understand petitioner to allege that respondent David “Doe” subjected him to cruel and unusual punishment in violation of the Eighth Amendment by failing to provide him with prompt medical treatment for his fractured wrist.

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, a plaintiff must establish facts from which it can be inferred that he had a serious medical need and that prison officials were deliberately indifferent to this need. See Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). In 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 Gutierrez, 111 F.3d at 1371, 1373. (“‘serious’ medical need is one that has been diagnosed by a physician as mandating treatment”). Plaintiff’s allegations of a fractured wrist are sufficient at this stage of the proceedings to suggest that he had a serious medical need.

The Supreme Court has held that deliberate indifference means 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. 824, 837 (1994). 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 can be shown by a defendant’s actual intent or reckless disregard. Reckless disregard is 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).

The question is whether the denial of medical treatment is “so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner’s condition,” Snipes, 95 F. 3d at 592, giving rise to a claim of deliberate indifference. See also Estelle, 429 U.S. at 104 (holding that deliberate indifference “is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed”). In this case, plaintiff alleges that the nurse on duty (who I understand to be respondent David “Doe,” the registered nurse petitioner named in the caption of his complaint) denied him medical care for 12 days. At this early stage of the proceedings, I conclude that an allegation of denial of medical care for a fractured wrist for 12 days is sufficient to show deliberate indifference. Accordingly, plaintiff will be allowed to proceed against respondent David “Doe” as to this claim.

To establish individual liability under § 1983, petitioner must allege that the individual respondents were involved personally in the alleged constitutional deprivation or discrimination. Individual defendants cannot be held liable under a theory of respondeat superior under § 1983. See Hearne v. Board of Education of City of Chicago, 185 F.3d 770, 776 (7th Cir. 1999). “Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused

or participated in a constitutional deprivation.” Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir.1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) (“A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary.”). Petitioner has not alleged that respondent Sheriff David Clarke was personally involved in withholding medical treatment. Nevertheless, I will grant petitioner’s request for leave to proceed against respondent Clarke for the sole purpose of discovering the last name of respondent David “Doe.”

A final word regarding venue is necessary. According to petitioner’s allegations, the acts giving rise to petitioner’s claims took place in the Eastern District of Wisconsin and it is likely that respondents reside in that same judicial district. Thus, it appears that venue in this court might be improper. See 28 U.S.C. §1391(b). Nevertheless, because defects in venue can be waived, see Fed. R. Civ. P. Rule 12(h), petitioner will be allowed to proceed at this time.

ORDER

IT IS ORDERED that

1. Petitioner Andrew Sato’s request for leave to proceed in forma pauperis against respondent David “Doe” is GRANTED;

2. Petitioner's request for leave to proceed against respondent Sheriff David Clarke is GRANTED for the sole purpose of discovering the last name of respondent David "Doe." Once petitioner learns respondent David "Doe's" name, he will have to amend his complaint to name fully that individual and eliminate Clarke as a respondent; and

3. Service of this complaint will be made promptly after petitioner submits to the clerk of court two (2) completed marshals service forms and three (3) completed summonses, one for each of the respondents and one for the court. Enclosed with a copy of this order are sets of the necessary forms. If petitioner fails to submit the completed marshals service and summons forms before May 28, 2003, or explain why he cannot do so, his complaint will be subject to dismissal for failure to prosecute; and

4. Petitioner should be aware of the requirement that he send respondent Clarke 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 Clarke or Doe, he should serve the lawyer 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 respondents' attorney.

Entered this 15th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge