IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

SHAWN McGARVEY,

Petitioner,

ORDER

04-C-269-C

v.

THOMAS BORGAN,
ANDREW BATH and
LT. DOMMISSE,

Respondents.

- -

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Fox Lake Correctional Institution in Fox Lake, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. 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. 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner will be allowed to proceed on his claim that respondent Dommisse retaliated against him for refusing to waive certain work restrictions by issuing a conduct report against him in violation of his rights under the First Amendment. In addition, petitioner will be allowed to proceed on his claim that respondents Borgan, Bath and Dommisse retaliated against him for sending a letter to congressman Paul Ryan regarding work safety conditions in prison employment by discontinuing his medical treatment for a broken thumb. Finally, petitioner will be allowed to proceed on his claim that respondents violated his rights under the Eighth Amendment by discontinuing prescribed treatment for his broken thumb. Petitioner will be denied leave to proceed on his claim that respondents

violated state law by holding him in temporary lock-up beyond statutory limit. This claim arises out of facts not implicated in his federal claims and thus, this court lacks jurisdiction over it.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Shawn McGarvey is a Wisconsin state inmate and at all relevant times, was incarcerated at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. At the Fox Lake facility, respondent Thomas Borgan is the warden, respondent Andrew Bath is a sergeant and respondent Dommisse is a lieutenant.

On or about June 30, 2003, petitioner suffered an injury at his job at Samuel's Recycling in Waupun, Wisconsin. The physician who treated petitioner that day concluded that he had broken his left thumb. Petitioner returned to work but was seen by the physician three days later. When the physician met with petitioner on July 14, 2003, he discovered further injury and recommended that petitioner not return to work.

On September 3, 2003, petitioner's employer requested that he sign a waiver of work restrictions and petitioner refused. Respondents pressured petitioner to return to work despite his injury. When petitioner refused to sign the waiver, respondent Dommisse issued a conduct report against him for violating Wis. Admin. Code § DOC 303.61 (refusal to

work); Wis. Admin. Code § DOC 303.63 (violation of institution policies and procedures) and Wis. Admin. Code § DOC 303.24 (disobeying orders).

Petitioner was placed in temporary lock-up that same day pending a hearing on the charges contained in the conduct report. State law provides that an inmate may not be held in temporary lock-up for more than twenty-one days without approval of the warden. On September 26, 2003, respondent Borgan authorized an extension of petitioner's confinement in temporary lock-up until October 5, 2003. However, petitioner was held there until the hearing was held on October 10, 2003. Petitioner was found guilty of the violations contained in the conduct report and accordingly, removed from community custody and the minimum security work release program.

At some point, petitioner sent a letter regarding work safety to Congressman Paul Ryan, who forwarded the letter to Congressman James Sensenbrenner, who in turn forwarded it to the Occupational Safety and Health Administration. As a result, a citation was issued. In retaliation for sending this letter, respondents cancelled petitioner's subsequent medical appointments, discontinued his treatment and attempted to force petitioner to pay for all of his medical expenses.

DISCUSSION

A. First Amendment: Retaliation

Petitioner has two First Amendment retaliation claims. First, he alleges that respondent Dommisse retaliated against him for refusing to waive work restrictions by issuing a conduct report and second, he contends that all respondents retaliated against him for writing a letter regarding work safety to Congressman Paul Ryan by canceling future medical treatment and attempting to force him to pay for his medical expenses. A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000).

To state a claim for retaliation, a petitioner need not allege a chronology of events from which retaliation could be plausibly inferred. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). However, he must allege sufficient facts to put the respondents on notice of the claim so that they can file an answer. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). This minimal requirement is satisfied where a petitioner specifies the protected conduct and the act of retaliation. Id.

With respect to his first retaliation claim, petitioner has alleged the conduct he believes to be constitutionally protected and a retaliatory act. However, it is not clear that petitioner's refusal to sign a waiver of work restrictions is protected speech under the First Amendment. Although the "speech" protected under that amendment encompasses more

than the spoken or written word, Texas v. Johnson, 491 U.S. 397, 404 (1989), an act must have some communicative element in order to qualify. United States v. O'Brien, 391 U.S. 367, 376 (1967) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging the conduct intends thereby to express an idea."). Conduct must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Spence v. Washington, 418 U.S. 405, 409 (1974). In making this determination, courts consider whether "'[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" Texas, 491 U.S. at 404 (quoting Spence, 418 U.S. at 410-11).

At this early stage, I cannot say as a matter of law that petitioner's refusal to sign the waiver was not "sufficiently imbued with elements of communication." Moreover, petitioner appears to suggest that respondent Dommisse was motivated also by the letter petitioner sent to a congressman when issuing the conduct report. Inmates have a First Amendment right to complain to governmental entities about prison conditions. Walker, 288 F.3d at 1009 (citing Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995) ("The 'government' to which the First Amendment guarantees a right of redress of grievances includes the prison authorities, as it includes other administrative arms and units of government.")). Although it is not clear that letter was sent before respondent Dommisse issued the conduct report,

construing petitioner's complaint liberally, I will assume that it was. Accordingly, petitioner will be allowed to proceed on his claim that respondent Dommisse retaliated against him for this conduct by issuing him a conduct report.

In addition, petitioner will be allowed to proceed on his claim that respondents violated his First Amendment rights by discontinuing his medical treatment and attempting to force him to pay for his medical expenses in retaliation for writing a letter to Congressman Paul Ryan regarding on-the-job safety in prison work programs. Petitioner has specified both his protected speech and respondents' retaliatory act and thus, has met the pleading requirements set forth in Higgs.

B. Eighth Amendment

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 establish 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.

Reading his complaint liberally, I understand petitioner to allege that respondents were deliberately indifferent to his serious medical needs when they cancelled his scheduled appointments with a physician and discontinued all other treatment relating to a broken thumb. "Serious medical needs" 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. Estelle v. Gamble, 429 U.S. 97, 103 (1976). The Court of Appeals for the Seventh Circuit has recognized that a "'serious' medical need is one that has been diagnosed by a physician as mandating treatment". Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997). Petitioner's allegation that a physician had prescribed treatment for his broken thumb is sufficient to suggest that he had a serious medical need.

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. 824, 837 (1994). 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). Deliberate indifference in the denial or delay of medical care can be shown by a respondent'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. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Petitioner's allegation that respondents canceled his scheduled appointments with a physician and discontinued treatment satisfies this standard. Deliberate indifference "is manifested . . . by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Estelle, 429 U.S. at 104. Accordingly, petitioner will be granted leave to proceed against all respondents on his Eighth Amendment claim.

C. State Law Violation

Finally, petitioner contends that respondents violated state law by holding him temporary lock-up beyond respondent Borgan's authorized extension of the twenty-one day statutory period. See Wis. Admin. Code § DOC 303.11(3) ("The institution shall not allow any inmate to remain in TLU more than 21 days, except that the warden may extend this period for up to 21 additional days."). Petitioner contends that the conduct report hearing and the punishment he received as a result, namely removal from community custody and the minimum security work release program, should be invalidated because of the violation of the state law provision governing the use of temporary lock-up. It is doubtful that petitioner has a civil cause of action against respondents for a violation of this provision or

that its violation, even if proved, would render invalid his subsequent disciplinary hearing. However, I need not address these issues. This court does not have jurisdiction over this claim.

Although federal courts have supplemental jurisdiction over some state law causes of action, this jurisdiction extends only to those claims "that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). This means that there must be a common nucleus of operative fact as to state and federal claims such that the claims would ordinarily be tried in one proceeding. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). In order to succeed on his state law claims, petitioner must show that he was held in temporary lock-up for a certain period and that this period exceeded the time authorized by respondent Borgan. These issues are not implicated in his federal claims and thus, supplemental jurisdiction does not attach. Accordingly, petitioner will be denied leave to proceed on his state law claims.

ORDER

IT IS ORDERED that

1. Petitioner Shawn McGarvey is GRANTED leave to proceed on his claims that

(a) Respondent Dommisse retaliated against petitioner by issuing him a

conduct report because he refused to sign a waiver of work restrictions in violation of his rights under the First Amendment;

(b) Respondents Thomas Borgan, Andrew Bath and Dommisse violated petitioner's First Amendment rights by discontinuing medical treatment for his broken thumb in retaliation for writing a letter to a congressman regarding work safety in prison employment programs;

(c) Respondents Borgan, Bath and Dommisse violated petitioner's rights under the Eighth Amendment when they canceled his scheduled appointments with a physician and discontinued his prescribed treatment.

2. Petitioner will be DENIED leave to proceed on his claim that respondents held him in temporary lock-up in violation of state law for lack of jurisdiction.

3. 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 has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

4. Petitioner should keep 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.

5. The unpaid balance of petitioner's filing fee is $111.09; petitioner is obligated to

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

6. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.

Entered this 24th day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge