

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

ROBIN DUNYELL BASS,

Plaintiff,

v.

LON BECHER, NURSE BARB,
NURSE AMANDA, ANN REENTS, and
LT. HONK,

Defendants.

ORDER

04-C-033-C

This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Plaintiff Robin Dunyell Bass is presently confined at the Dane County jail in Madison, Wisconsin. Although plaintiff has paid the filing fee in full, because he is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915A. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or 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. 42 U.S.C. § 1915(e).

From my review of plaintiff's complaint, I conclude that plaintiff has failed to state a claim under the Eighth or Fourteenth Amendments. Plaintiff fails to allege facts suggesting that defendants have been deliberately indifferent to a serious medical need. Furthermore, plaintiff's conclusory allegation of racial profiling is insufficient to state a claim under the Fourteenth Amendment. Because I will deny plaintiff leave to proceed on his federal claims, I will not exercise supplemental jurisdiction over plaintiff's state law claim under Wis. Stat. § 655.42.

In his complaint and attachments, plaintiff alleges the following facts.

FACTUAL ALLEGATIONS

Plaintiff Robin Dunnyell Bass is a prisoner confined at the Dane County jail in Madison, Wisconsin. Defendant Lon Becher is the medical administrator for the jail. Defendants "Nurse Barb," "Nurse Amanda," Ann Reents and Lt. Honk are employed by Prison Health Services, Inc., which provides medical services to inmates at the Dane County jail. Reents is a registered nurse.

Defendants Becher and Reents have promised to meet plaintiff's medical needs. However, on numerous occasions, nursing staff come to work with personal problems and do not fully address or follow a physician's order. As a result, inmates are not provided the correct medications, if they get them at all. Plaintiff has bumps under his arms and around

his groin area that have not been treated properly. Medical staff have prescribed for plaintiff the following medications: 1) ranitidine, 150 mg/twice daily; 2) naprosyn, 500 mg/twice daily; 3) Eucerin cream to be applied to affected areas twice daily; and 4) TAC cream to be applied twice daily for two months. Plaintiff has not seen a doctor or a nurse, even though he was told that he would see a doctor in November 2003. Plaintiff has offered to pay for treatment but jail staff refused his offer.

Plaintiff submitted several “sick call slips” and received responses to them as follows:

1. **Date:** July 16, 2003; **Request:** Need to see doctor; can’t get sleep due to stomach acid reflux; has “Zantac and can take rantitidine; pain almost unbearable; need to update cortisone shot and fungus cream.

Date: July 16, 2003; **Response:** “You will discuss the acid reflux with the M.D. As for pain pills and fungal cream you have to buy these off of canteen with the \$917.50 you have in your account.”

2. **Date:** August 6, 2003; **Request:** Medicines not fully entered into computer; important for information about medicines, creams and special shoes to be entered into computer so can be discussed between medical provider and patient.

Date: August 7, 2003; **Response:** “Will enter in computer.”

3. **Date:** August 10, 2003; **Request:** Need refill on cream and need to see doctor about medication; pills taking currently killing stomach lining; need cortisone shot; doctor’s contact information is Dr. Notle at 825-3008.

Date: August 12, 2003; **Response:** “No cortisone shots are given in jail. We do not call your doctor — while you are here, our doctor is your doctor. One request per slip.”

4. **Date:** September 2, 2003; **Request:** Need to speak with doctor about medication and creams; seem to have problems getting cream written to Ann Reents; doctor outside jail filed inmate complaint forms; trying to see a doctor

for hepatitis, diabetes, skin problems, and personal problems.

Date: September 3, 2003; **Response:** “MD list.”

5. **Date:** September 10, 2003; **Request:** Received order for Zantac/ranitidine at 150 mg; other medication taken eats at stomach; would like dose raised to 300 mg twice a day to promote better sleep and ability to drink water, eat foods and fruit.

Date: September 11, 2003; **Response:** “Ranitidine will not be increased — tums can be bought on canteen.”

6. **Date:** October 4, 2003; **Request:** Need to see doctor about medication orders; orders messed up again.

Date: October 4, 2003; **Response:** “All ready addressed.”

7. **Date:** October 7, 2003; **Request:** Need to know what type of meds should have, such as creams and pills; all out of TAC cream, although doctor prescribed it.

Date: October 7, 2003; **Response:** “You are to get your creams and lotions from canteen from now on per the doctor. For your medical records you need to request this in writing through jail administration.”

8. **Date:** October 9, 2003; **Request:** write down all orders on chart.

Date: October 8, 2003; **Response:** “Ranitidine 150 mg twice daily; Naprosyn 500 mg twice daily; Eucerin cream affected cream; TAC cream affected and twice daily for two months.”

9. **Date:** October 14, 2003; **Request:** Need TAC cream refilled.

Date: October 15, 2003; **Response:** May use Eucerin cream to dry feet; doctor stated that Eucerin and TAC cream almost the same; do not have TAC cream, will not order it or have it at the jail.

10. **Date:** November 18, 2003; **Request** (to Ann Reents): has no onion order but still sending foods with onions preventing ability to eat half the tray of food.

Date: November 18, 2003; **Response:** “No fax has been sent to me regarding this. Have your MD fax to 284-6074, Attn: Ann.”

In addition to the sick slips, plaintiff submitted three grievances and an appeal. Reents substantiated plaintiff's September 3, 2003 grievance stating that plaintiff had an appointment with the jail doctor and that he should discuss all health issues, including the spots on his hands, with the doctor. Reents did not substantiate the other two grievances.

Reents's response to the October 13, 2003 stated:

I spoke with you and assured you I was not fired. I also spoke with the nurse regarding this issue. I personally spoke with the MD about your Lac Hydric cream for your feet. He ordered Eucerin Cream as he felt it was not an emergency for you to go out for your dry feet.

Reents's response to plaintiff's December 2, 2003 grievance stated:

You are being provided with adequate medical care that is meeting your needs. All inmates are treated equally without preferentiality. All medical conditions MUST be supported with medical documentation. You have made 19 medical requests since August, 2003 which have all been answered by a nurse. You have seen a physician/advance practice nurse prescriber 7 times in this time period. All requests are initially screened by a nurse and forwarded to a clinician when appropriate. We will continue to meet your medical needs as long as you are incarcerated here.

On December 16, 2003, defendant Hook affirmed the dismissal of plaintiff's December 2, 2003 complaint. Plaintiff seeks treatment at the University of Wisconsin Hospital.

DISCUSSION

Plaintiff argues that his case consists not only medical issues but racial profiling as well. I will construe plaintiff's claims against defendants as falling under both the Eighth and Fourteenth Amendments. Plaintiff requests that the court require the parties to participate in mediation, as provided in Wis. Stats. § 655.42(1) (requiring mediation to resolve disputes regarding medical malpractice between patients and health care providers).

A. Eighth Amendment Claim

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) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)), but this does not mean that prisoners are entitled to whatever medical treatment they desire. Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care only when they are deliberately indifferent to a prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Because judges are not doctors, it is difficult for them to determine what constitutes an excessive or substantial risk of serious harm. Although the Constitution is not a “charter of protection for hypochondriacs,” see Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996), courts should recognize that inmates have serious medical needs if they are suffering from medical conditions generally considered as life-threatening or as carrying risks of permanent, serious impairment if left untreated. Even if inmates are not facing death or

permanent harm, prison officials have an obligation to provide medical treatment to inmates suffering such significant pain that denial of assistance would be “uncivilized.” Id.; but see Snipes, 95 F.3d at 592 (Eighth Amendment does not require prison doctors to keep an inmate pain-free in the aftermath of proper medical treatment).

To show deliberate indifference, the plaintiff must establish that the official was “subjectively aware of the prisoner’s serious medical needs and disregarded an excessive risk that a lack of treatment posed” to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). In other words, the plaintiff 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). Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

Plaintiff fails to allege facts showing that defendants were deliberately indifferent to a serious medical need. Plaintiff complains of bumps on his skin and alleges that he has not seen a doctor or nurse and that defendants are not properly treating his medical needs. Even if I assume that plaintiff’s skin bumps qualify as a serious medical need, the facts show that plaintiff saw a physician or advance practice nurse seven times within a five month period and that defendants have responded to each of plaintiffs’ medical slip requests, advising him to purchase certain medications and creams for his conditions from the canteen. Plaintiff may prefer alternative treatments, and even be willing to pay extra for those treatments, such

as cortisone shots, treatment at the University of Wisconsin Hospital or another type of medication that is unavailable at the canteen, but not receiving one's preferred treatment does not rise to the level of an Eighth Amendment violation. Inadvertent error, negligence, ordinary malpractice, or even gross negligence does not constitute deliberate indifference. Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515 (7th Cir. 2002); see also Snipes, 95 F.3d at 590-91. Accordingly, I will deny plaintiff leave to proceed on his Eighth Amendment claim.

B. Fourteenth Amendment

In his complaint, plaintiff states that his case contains both medical and racial profiling issues. From this statement, I have construed his complaint liberally as alleging that each named defendant's conduct was motivated by a desire to discriminate against him on the basis of his race.

Racism in any form is reprehensible. Although prisoners are expected to endure many "harsh" and "restrictive" conditions as "part of the penalty . . . for their offenses," Rhodes v. Chapman, 452 U.S. 337, 347 (1981), they should not be expected to endure bigotry and intolerance. See Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y. 1991) ("Racism is never justified; it is no less inexcusable and indefensible merely because it occurs inside the prison gates."). The equal protection clause of the Fifth and Fourteenth Amendments

prohibits government actors from applying different legal standards to similarly situated individuals. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Discriminatory intent may be established by showing an unequal application of a prison policy or system, but conclusory allegations of racism are insufficient. Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986).

Plaintiff does not allege any facts to support his claim that defendants' actions toward him were different from actions they would have taken against a white inmate under the same or similar circumstances. His unsupported and conclusory claim of racism is the precise kind of discrimination claim that must fail at the outset. Therefore, I will deny petitioner leave to proceed on his claim that the respondents discriminated against him on account of his race.

C. Request for Mediation

A request for mediation under Wis. Stat. § 655.42 may provide plaintiff with an opportunity to discuss his concerns about medical negligence with defendants. It is plaintiff's responsibility to request such mediation. Wis. Stat. § 655.44. Plaintiff has failed to allege any facts showing that he filed a request for mediation with the director of state courts, as required under Wis. Stat. § 655.44(3). Even if plaintiff had made a mediation request, this court does not have jurisdiction over plaintiff's state law claims when plaintiff's

complaint contains no federal claims. Typically, I exercise supplemental jurisdiction over a plaintiff's state law claims when the state law claim arises out of the same operative facts as the federal claims on which I have allowed the plaintiff to proceed. See 28 U.S.C. § 1367(c)(3); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or refuse jurisdiction over state law claims). Because I am denying plaintiff leave to proceed on his federal claims, I will not exercise supplemental jurisdiction on plaintiff's request for mediation under Wis. Stat. § 655.42.

ORDER

IT IS ORDERED that

1. This action is DISMISSED pursuant to 28 U.S.C. § 1915A because the claims in the complaint fail to state a claim upon which relief may be granted.
2. The clerk of court is directed to enter judgment for defendants and close this case.
3. A strike will be recorded against plaintiff in accordance with 28 U.S.C. § 1915(g).

Entered this 17th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge