IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GEORGE JOHN LAZARIS,

ORDER

Plaintiff,

04-C-844-C

v.

WARDEN KARLIN, WARDEN McCARTHY,
DR. FERN SPRINGS, DR. LARSON,
DR. ANKARLO, CAPTAIN TEGEL,
JILL KNAPP, LIZ HEARTMAN,
UNIVERSITY OF WISCONSIN HOSPITAL,
MATTHEW FRANK and JOHN DOES ##1-2,

Defendants.

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This is a proposed civil action for injunctive relief, brought under 42 U.S.C. § 1983. Plaintiff George John Lazaris, who is presently confined at the Columbia Correctional Institution in Portage, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. He has paid the $150 filing fee. Nevertheless, because he is a prisoner, he is subject to the 1996 Prison Litigation Reform Act. Under the act, plaintiff cannot proceed with this action unless the court grants him permission to proceed after screening his complaint pursuant to 28 U.S.C. § 1915A.

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'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 plaintiff's case on its own motion for lack of administrative exhaustion, but if defendants believe that plaintiff 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).

Plaintiff has attached to his complaint a lengthy inmate grievance dated August 24, 2004, addressed to the Wisconsin Department of Corrections, Office of Audits, Investigations and Evaluations. This office is not the proper recipient for inmate grievances. See Wis. Admin. Code § DOC 310.01-.18. An inmate's complaints are not relevant to the issue of exhaustion if not filed in accordance with the rules governing inmate complaint. Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Accordingly, I am not treating this grievance as part of the complaint but it will be available to defendants in the court's file. In the remainder of plaintiff's complaint, I understand him to allege the following facts.

ALLEGATIONS OF FACT

Plaintiff George John Lazaris is confined at the Columbia Correctional Institution in Portage, Wisconsin, because of a minor parole infraction. Between March 10, 2004 through at least November 10, 2004, plaintiff was confined at the Waupun Correctional Institution in Waupun, Wisconsin. Before then, he had been incarcerated at the Jackson Correctional Institution, in Black River Falls, Wisconsin. At the Jackson facility, defendant Karlin is the warden, defendant Springs is a doctor and defendant Tegel is a captain. At the Waupun institution, defendant McCarthy is the warden and defendants Larson and Ankarlo are doctors. Defendant Jill Knapp is a probation agent and her supervisor is defendant Liz Heartman. Defendant Matthew Frank is Secretary of the Wisconsin Department of Corrections. Defendant University of Wisconsin Hospital is located in Madison, Wisconsin.

On October 25, 2002, plaintiff was sent to the University of Wisconsin hospital for emergency treatment of his ankle. He advised the intake nurse and the orthopedic doctor that he had chest pains and trouble breathing. Plaintiff had a blood pressure of 183/123. Had the emergency room staff intervened, they would have discovered plaintiff's heart disease. Plaintiff was seen by multiple heart doctors while at the hospital; however, they lied to him by telling him that he would not suffer from heart disease for years. Certain infectious disease doctors told plaintiff that he suffered from infectious endocarditis. Defendant Springs would not treat the infection causing this heart disease.

The orthopedic department recommended that plaintiff be returned to St. Luke's Hospital in Milwaukee, Wisconsin for surgery but another doctor (whom plaintiff does not identify) wrote that the department had determined that no surgery was necessary. A memo from the orthopedic department advising defendant Springs to send plaintiff to St. Luke's Hospital for surgery was placed in plaintiff's medical file. (The discrepancy in dates is immaterial for purposes of this order.) The Department of Corrections deliberately ignored this memo. At some point, defendant Springs removed the memo from plaintiff's file to prevent plaintiff from discovering it.

Plaintiff filed an inmate complaint, alleging that defendant Springs had failed to comply with the memo's instructions that plaintiff be taken to St. Luke's Hospital for surgery. The inmate complaint examiners reviewing plaintiff's grievance denied it on the ground that plaintiff had not filed his complaint within fourteen days of the alleged wrongdoing. Plaintiff could not have filed a complaint within the required fourteen-day period because he did not know about the memo until after the fourteen days had elapsed. At some later point, plaintiff was "going hot and heavy on the grievances [and] [defendant] Springs retaliated by refusing [him] medical treatment."

After plaintiff was transferred to the Waupun facility, defendant Larson failed to follow the recommendation of the University of Wisconsin hospital orthopedic department that plaintiff be taken to St. Luke's Hospital for surgery. Every time plaintiff went to the

health services unit at Waupun, plaintiff had a low grade fever, indicating infection. Because he had a history of osteomyolitis, plaintiff asked defendant Larson to give him antibiotics pursuant to the instructions of Dr. Striker, an infectious disease doctor at the university hospital. Defendant Larson failed to comply with plaintiff's request that he call Dr. Striker. At one point, plaintiff's foot turned red and began draining blood and pus. Defendant Larson requested that plaintiff be taken to the university hospital but plaintiff refused because he had been treated unethically there in the past. Plaintiff had filed a lawsuit against the university hospital and thought that being treated there would present a conflict of interest. Plaintiff asked defendant Larson to have him sent to St. Luke's Hospital and Dr. Larson refused.

Sometime near the end of September 2004, plaintiff felt severe pressure in the heart area. When he asked sergeant Nivers to send him to the health services unit, Nivers laughed in his face. Approximately three hours later, plaintiff's mother called the health services unit; plaintiff was taken for an examination shortly thereafter. One of the health services staff took an EKG, which revealed that plaintiff's heart condition had gotten worse. Nonetheless, plaintiff is receiving no medical treatment. He continues to suffer from the discharge of blood and pus from his foot, a fever and osteomyolitis; plaintiff's life is in extreme danger and he has been told that he may have to have his leg amputated.

Even though plaintiff has informed defendant Ankarlo about his obsessive thoughts

about dying and being lowered into the ground, defendant Ankarlo has denied plaintiff psychological care, stating that his department is short-staffed. Plaintiff suffers from on-going anxiety and depression and if he does not receive mental health care, "something will happen." (In apparent contradiction of the allegations in his complaint, plaintiff has attached a memo that defendant Ankarlo sent to plaintiff, indicating that plaintiff has been receiving mental health treatment and was not in need of the long term individual care he sought.)

Plaintiff sent a letter to defendant Frank. The letter was returned to plaintiff with a sticker on it indicating that the postal service could not find the addressee. Plaintiff wrote another letter to defendant McCarthy. Defendant McCarthy took no action in response.

DISCUSSION

A. Personal Involvement

It is well established that liability under § 1983 must be based on a defendant's personal involvement in the alleged constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); 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." Wolf-Lillie, 699 F.2d at 869.

It is not necessary that a defendant participate directly in the deprivation; the official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). The doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981).

Plaintiff has not alleged that defendants Karlin, McCarthy, Tegel, Knapp, Heartman and John Does Nos. 1 and 2 were personally involved in any constitutional violation. Plaintiff has not made any allegations relating to defendants Karlin, Tegel or John Does Nos. 1 and 2. With respect to defendants Knapp and Heartman, plaintiff alleges that he is incarcerated because of a parole rule violation, that Knapp is his parole officer and that Heartman is her supervisor. Plaintiff does not argue that his current incarceration is unconstitutional. Even if he had, a civil action under § 1983 would not be an appropriate vehicle for raising such an argument. Plaintiff alleged that he sent a letter to defendant McCarthy, who took no responsive action. It is unreasonable to expect a prison warden to respond to every letter received; under the circumstances, there is no basis for inferring reckless or deliberate indifference. Moreover, plaintiff does not have a constitutional right to a favorable response to his letter or even to an answer. Mann v. Adams, 855 F.2d 639,

640 (9th Cir. 1988). Accordingly, these named defendants will be dismissed.

B. Eighth Amendment

The Supreme Court held in Estelle v. Gamble, 429 U.S. 97, 104-05 (1976), that deliberate indifference to prisoners' serious medial needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. To state a claim under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. In other words, 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).

1. Serious medical need

In attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated and those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. See id. at 1371. In addition, the court has recognized that serious medical needs include conditions that have been diagnosed by a physician as mandating treatment. Foelker v. Outagamie

County, — F.3d. —, 2005 WL 30504, *2 (7th Cir. Jan. 7, 2005) (citing Gutirrez, 111 F.3d at 1371). Finally, serious medical needs are not restricted to physical conditions; the need for a mental illness to be treated may be considered a serious medical need if it could result in significant injury, such as death by suicide, or the unnecessary and wanton infliction of pain. Sanville v. McCaughtry, 266 F.3d 724, 734 (7th Cir. 2001).

I understand plaintiff to allege that he suffers from three medical conditions: heart disease, a foot infection and mental illness. According to his allegations, plaintiff's heart disease is life-threatening. With respect to his foot infection, plaintiff alleges that his leg may need to be amputated if the condition goes untreated and that the orthopedic department of the university hospital wrote a memo directing the prison to have plaintiff sent to St. Luke's Hospital for surgery. As to his alleged mental illness, plaintiff asserts that he suffers from anxiety and depression and that if he does not receive treatment, "something will happen." Although this statement is cryptic, I will construe it liberally as I must to mean that plaintiff will inflict some kind of harm on himself if he does not receive mental health care. At this early stage of litigation, these allegations are sufficient to meet the serious medical needs prong.

2. Deliberate indifference

The subjective element of a claim of cruel and unusual punishment requires that the

prison official act with a sufficiently culpable state of mind. Gutirrez, 111 F.3d at 1369. 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). 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 v. Detella, 95 F.3d 586, 590-91 (7th Cir. 1996). However, "a prisoner claiming deliberate indifference need not prove that the prison officials intended, hoped for, or desired the harm that transpired." Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). It is enough to show that the defendants actually knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk. See id.

I understand plaintiff to allege that both defendants Springs and Larson refused to treat an infection, that the infection caused or exacerbated plaintiff's heart disease and that defendant Larson is not providing plaintiff with any treatment for the infection or the heart disease. Although plaintiff has not alleged that either defendant Springs or Larson knew or should have known that infection would lead to heart disease if left untreated, I will infer such an allegation pursuant to the rule of liberal construction. Haines, 404 U.S. at 521. However, even under a liberal construction, plaintiff's allegations regarding the university hospital do not make out an actionable claim. Plaintiff alleges specifically that staff at the

university hospital could have but failed to discover his heart disease. Because plaintiff alleged that the hospital was not subjectively aware of his medical heart disease, he has not stated an Eighth Amendment claim against it. Accordingly, I will dismiss defendant university hospital because plaintiff has failed to state an actionable claim against it.

With respect to his foot, plaintiff has alleged that both defendants Springs and Larson failed to follow a directive of the university hospital's orthopedic department that plaintiff be taken to St. Luke's Hospital. (Plaintiff has not indicated expressly whether the surgery is for his foot or heart. Because the memo was sent from an orthopedic department, I am assuming that the surgery relates to plaintiff's ankle.) Of course, a difference of opinion about the type of care provided does not constitute deliberate indifference. Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996). However, it is not clear at this early stage of litigation whether defendants Springs and Larsons determined that surgery was not required or whether they simply disregarded the memo. Because a claim should be dismissed only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984), I will allow plaintiff to proceed on this claim.

As to plaintiff's claim that he has not received adequate mental health care, plaintiff has alleged that he told defendant Ankarlo that he had obsessive thoughts about dying but that defendant Ankarlo denied treatment because of a staffing shortage. The court of

appeals has held that systemic staff shortages that prevent mental health treatment constitute deliberate indifference to serious medical needs amounting to cruel and unusual punishment under the Eighth Amendment. Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983)("As a practical matter, 'deliberate indifference' can be evidenced by "proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care."). Thus, plaintiff's allegations are sufficient to make out a claim under the Eighth Amendment. I will grant petitioner leave to proceed against both defendant Ankarlo because he was allegedly in charge of allocating the limited staff resources and defendant Frank because he is ultimately responsible for any systemic staffing deficiencies.

C. First Amendment

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). The official's action need not independently violate the Constitution. Id. 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); see also Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory

reasons.") Plaintiff has a constitutional right to file complaints or grievances, complaining about prison conditions.

To state a claim for retaliation, a plaintiff need not allege a chronology of events from which retaliation could be plausibly inferred. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, he must allege sufficient facts to put the defendants on notice of the claim so that they can file an answer. Id. Specifically, plaintiff must at least specify the suit or complaint he filed and the act of retaliation. Id. Despite the minimal pleading burden, plaintiff has failed to meet it. He has not identified the inmate grievance or grievances he filed that caused defendant Springs to retaliate against him by refusing to provide him with medical treatment. Plaintiff alleges only that he was "going hot and heavy on the grievances." He does not indicate the dates on which these complaints were filed, provide any complaint identification numbers or say what these greivances were about. One might speculate that the complaints were about defendant Springs's refusal to have plaintiff sent to St. Luke's for treatment but this would be nothing more than a guess. Plaintiff has attached two inmate grievances to his complaint. However, neither of these grievances could be the complaints to which plaintiff refers; both were filed after plaintiff was transferred to the Waupun facility. I will give plaintiff until February 14, 2005, to amend his complaint to identify the grievance or grievances which he believes caused defendant Springs to retaliate against him.

D. Damages

Finally, plaintiff's complaint does not comply with Fed. R. Civ. P. 8(a)'s requirement for a formal prayer for relief. In his complaint, plaintiff does not formally ask for any particular relief, although he discusses at length the reasons why he thinks he would be a good candidate for parole and at one point mentions a pardon. Plaintiff should be aware that the relief he appears to seek would not be available to him if he were to prevail on his Eighth Amendment claims. Section 1983 creates a civil action designed to make plaintiff whole for the constitutional injury alleged. Thus, if plaintiff proves the constitutional violations he alleges, he may be entitled to monetary damages, declaratory relief and an injunction requiring that defendants Ankarlo and Larson make available certain medical treatment. I will allow plaintiff until February 11, 2005, in which to submit a supplement to his complaint to specify the amount of money damages he seeks and whether he seeks injunctive or declaratory relief. If plaintiff determines that he is not interested in pursuing this lawsuit in light of the fact that it will not entitle him to release from prison, I will dismiss his claims without prejudice to his refiling them again in the future.

E. Motion for Appointment of Counsel

Plaintiff asks that counsel be appointed to represent him in this case. Before the court can appoint counsel in a civil action such as this, it must find first that the plaintiff made a

reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff must submit a list of the names and addresses of at least three lawyers who declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Plaintiff does not suggest that he has made an effort to find a lawyer on his own and that his efforts have failed.

Second, the court must consider whether the plaintiff is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is too new to allow me to assess plaintiff's abilities. Therefore, plaintiff's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

ORDER

IT IS ORDERED that

1. Plaintiff George John Lazaris may have until February 14, 2004, in which to supplement his complaint identifying the grievance or grievances he believes caused defendant Fern Springs to retaliate against him in violation of the First Amendment. In addition, plaintiff may have until February 14, 2005, in which to supplement his complaint

to specify the amount of money damages he seeks and whether he seeks injunctive or declaratory relief. If plaintiff fails to respond by that time, or if he responds and indicates that he is not interested in pursuing either a retaliation claim or appropriate damages, I will dismiss his claims without prejudice to his refiling it at a later time. If plaintiff makes an appropriate prayer for relief, I will grant him leave to proceed on his claim that defendants Springs and Larson violated his Eighth Amendment rights by denying him medical treatment for heart disease and surgery for his ankle and his claim that defendants Ankarlo and Matthew Frank denied him mental health care. In addition, I will grant plaintiff leave to proceed on his retaliation claim if he identifies the grievances underlying that claim.

2. Defendants Karlin, McCarthy, Tegel, Jill Knapp, Liz Heartman, University of Wisconsin Hospital and John Does Nos. 1 and 2 are DISMISSED from this case.

3. Plaintiff's motion for appointment of counsel is DENIED without prejudice to his renewing it at some later stage of the proceedings.

Entered this 31st day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge