

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

JAMES M. UPTHEGROVE,

Petitioner,

v.

SGT. KUKA and
C.O. MUHE,

Respondents.

ORDER

05-C-153-C

This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Jackson Correctional Institution in Black River Falls, 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); 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 an inmate at the Jackson Correctional Institution in Black River Falls, Wisconsin. Respondent Kuka is a sergeant at the institution and respondent Muhe is a correctional officer at the institution.

Petitioner suffers from chronic back pain because of damaged discs in his back. Jackson Correctional Institution medical staff have prescribed him methadone to treat his back pain.

On November 21, 2004, at 12:45 p.m., petitioner asked respondents Kuka and Muhe to dispense his next dose of methadone to relieve his back pain. Respondents Kuka and Muhe refused to provide the medication, causing petitioner to suffer great pain. Petitioner pleaded with respondents and told them that he was experiencing a tremendous amount of pain, but respondents denied petitioner his medication.

DISCUSSION

Petitioner alleges that respondents Kuka and Muhe were deliberately indifferent to his serious medical needs when they refused to provide him with his prescribed pain medication. “[T]he 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, in order to succeed on his claim, 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; 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. Gutierrez, 111 F.3d at 1371, 1373. (“‘serious’ medical need is one that has been diagnosed by a physician as mandating treatment”).

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 (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); see also Snipes, 95 F.3d at 590-91. 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. 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").

Taking the allegations in petitioner's complaint as true, petitioner's extreme pain from being denied his prescribed medication is sufficient to suggest that petitioner had a serious medical need. I cannot conclude that there is no set of facts that petitioner could prove that would show that each of the respondents was deliberately indifferent to that need.

However, I must caution petitioner that the documentation of his administrative exhaustion efforts that petitioner attached to his complaint suggests that his assertions of wrongdoing may be embellished and that his complaint may have been brought for an improper purpose in violation of Fed. R. Civ. P. 11. The inmate complaint that petitioner attached to the complaint filed in this court describes the incident that occurred on November 21, 2004. Curiously, the complaint asserts that respondent Kuka, and only respondent Kuka, refused petitioner his medication. There is no mention whatsoever of wrongdoing on the part of respondent Muhe.

More problematic, according to the inmate complaint examiner report that investigated petitioner's complaint, Kuka denied petitioner his medication because Kuka's shift was ending at the time petitioner had requested his medication. The report states that Kuka told petitioner to make his request to respondent Muhe, who was relieving Kuka.

Respondents may raise the argument that petitioner failed to exhaust his administrative remedies as to respondent Muhe, because it does not appear that petitioner ever complained about Muhe. Such an argument may be sufficient to require dismissal of petitioner's case against respondent Muhe. Furthermore, even if petitioner exhausted his administrative remedies, if petitioner is unable to prove that the inmate complaint examiner was wrong when he explained the reason why Kuka denied petitioner his medication, then Kuka's refusal would not amount to deliberate indifference.

Petitioner signed his complaint under penalty of perjury, although he did not need to do so. If petitioner pursues his claims against respondents knowing that his allegations are exaggerated, he may be subject to sanctions under Fed. R. Civ. P. 11, which prohibits litigants from presenting pleadings to the court for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, or for raising allegations that do not have evidentiary support. Nevertheless, accepting the allegations in petitioner's complaint as true, as I must at this early stage of the proceedings, I will allow petitioner to proceed in forma pauperis on his Eighth Amendment claim against respondents Kuka and Muhe.

ORDER

IT IS ORDERED that petitioner James M. Upthegrove's request for leave to proceed

in forma pauperis is GRANTED on his Eighth Amendment claim against respondents Kuka and Muhe.

- 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.
- 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.
- The unpaid balance of petitioner's filing fee is \$213.86; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).
- 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.
- Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. Those papers are not considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event respondents wish to

examine them.

Entered this 8th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge