IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY STEVEN AKRIGHT,

ORDER

Plaintiff,

05-C-27-C

v.

SHERIFF DAVID GRAVES;
STEPHEN A. CULLINAN, Doctor;
MICHAEL T. SCHMITZ, Administrator;
JAMES DELANEY, Assistant Administrator;
E. PETERS, Head Nurse; L. BAKER, Nurse;
SGT. KEVIN HURST; SGT. CHARLES HALL;
SGT. TRACY REIFF; SGT. DAVID BJORGE;
SGT. STACY BUTKE; SGT. MICHAEL TROEMEL;
C.O. HEATHER DUNN; C.O. PAUL YAKOWENKO;
C.O. JOHN KEIST; C.O. JOHN KEIST IV;
C.O. PATRICIA COLE; C.O. JENNIFER RATKIE;
C.O. RICHARD CRAIG; C.O. MARIO RILEY;
C.O. RANDY BILLINGTON; C.O. RICK CARROLL;
C.O. CLAYTON; C.O. BLOGREN; C.O. ZIMMERMAN;
C.O. GOODMAN; MS. POWERS, Classification; and
MS. ZINNO, Classification,

Defendants.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Plaintiff, who is presently confined at the Walworth County Jail in Elkhorn, Wisconsin,

alleges that defendants violated his rights under the Eighth Amendment by denying him medical care. Plaintiff has paid the $150 filing fee. Nevertheless, because he is a prisoner, he is subject to the 1996 Prison Litigation Reform Act. The act requires the court to deny leave to proceed if plaintiff'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). 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, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

On September 2, 2004, Dr. Michael J. Nute diagnosed plaintiff as having "chronic instability with defragments" in his ankle. Paperwork concerning plaintiff's need for surgery was faxed to the medical staff and the Walworth County jail. Dr. Nute gave plaintiff a "sleep hygine [sic] sheet" with information pertaining to sleep; either he misunderstood plaintiff's medical condition or did not care. Also during plaintiff's visit, defendant Peters

screamed at plaintiff that he was faking his medical problems. Plaintiff has been denied further medical treatment which has increased multiple medical problems with his ankle. The Walworth County jail does not have housing that is adequate to accommodate his medical needs.

On September 5, 2004, plaintiff was placed in disciplinary segregation for five days. During that time, his ankle swelled and "locked into place" several times. Plaintiff informed the nursing staff of his condition but nothing was done to relieve the pain or swelling. On September 10, plaintiff was moved to administrative segregation. He was forced to walk up and down stairs from administrative segregation to receive medical treatment or see visitors. Plaintiff saw the jail doctor regarding his condition on October 31, 2004.

DISCUSSION

I understand plaintiff to allege that defendants violated his Eighth Amendment rights because they failed to properly treat his ankle injury, thereby causing him needless pain and suffering. 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, 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). Id. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). The Court of Appeals for the Seventh Circuit has held that the phrase "serious medical needs" encompasses 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. 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 (1993). 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); Snipes, 95 F.3d at 590-91. Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard is characterized by 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).

Plaintiff alleges that he was diagnosed with "chronic instability with defragments" in his ankle which requires surgery and that he has been denied medical treatment, thereby

aggravating his condition. He states that while he was in disciplinary segregation in early September 2004, his ankle swelled and locked into place several times, causing pain, but that "nursing staff" did not attend to his medical needs at this time. At this stage of the litigation, these allegations are sufficient to allow an inference to be drawn that plaintiff's condition constituted a serious medical need. As for deliberate indifference, plaintiff states in his complaint that he believes the facts show negligence on the part of Walworth County Jail medical staff. As a matter of law, allegations of negligence are insufficient to state a claim under the Eighth Amendment; however, plaintiff alleges more than mere negligence. He states that after his September 2, 2004 visit with Dr. Nute, the "medical staff and the jail" received paperwork about his need for surgery. In the next sentence, plaintiff states that he has been denied further medical treatment, which implies that he has experienced needless pain because he has not received necessary surgery. Moreover, plaintiff informed the nursing staff in disciplinary segregation that his ankle had swollen and locked into place several times but nothing was done to relieve the pain or swelling. Construing the complaint liberally, I find these allegations sufficient to state a claim of deliberate indifference because they permit the inference that members of the jail medical staff were aware of plaintiff's pain and need for surgery but have failed to provide appropriate care. Walker v. Benjamin, 293 F.3d 1030, 1039-40 (7th Cir. 2002) (allegations of failure to dispense pain medication sufficient to state claim for deliberate indifference); Johnson v. Lockhart, 941 F.2d 705 (8th

Cir. 1991) (delay in providing surgery that results in needless pain and suffering suffices to state claim under Eighth Amendment).

I note that only one of the twenty-eight defendants in this case is mentioned by name in the body of plaintiff's complaint: defendant Peters. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. See 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).

Although plaintiff does not allege any facts to suggest how the other defendants might have been involved personally in the alleged violations of his constitutional rights, I will allow him to proceed against defendants Graves, Cullinan, Peters and Baker. Plaintiff's allegation that "the jail" received paperwork regarding his need for surgery is sufficient to state a claim against defendant Graves, who is the Walworth County sheriff. On the other

hand, the allegation that the Walworth County jail lacks adequate housing to accommodate plaintiff's medical needs is too vague to state a claim for deliberate indifference against defendant Graves. Moreover, plaintiff's allegations that "the medical staff" received notice of his need for surgery and that he notified "the nursing staff" in disciplinary segregation of the pain in his ankle several times are sufficient to state a claim against defendant Cullinan, who is a doctor, as well as defendants Peters and Baker, who are nurses. Defendants Schmitz, Delaney, Hurst, Hall, Reiff, Bjorge, Butke, Troemel, Dunn, Yakowenko, John Keist, John Keist IV, Cole, Ratkie, Craig, Riley, Billington, Carroll, Clayton, Blogren, Zimmerman, Goodman, Powers and Zinno will be dismissed from this case for plaintiff's failure to allege their personal involvement in the complained of acts.

ORDER

IT IS ORDERED that

1. Plaintiff Jeffrey Steven Akright may proceed against defendants Sheriff David Graves, Dr. Stephen A. Cullinan and Nurses E. Peters and L. Baker on his claim that they violated his Eighth Amendment rights by ignoring his need for surgery and complaints about the pain in his ankle;

2. Defendants Michael T. Schmitz, James Delaney, Kevin Hurst, Charles Hall, Tracy Reiff, David Bjorge, Stacy Butke, Michael Troemel, Heather Dunn, Paul Yakowenko, John

Keist, John Keist IV, Patricia Cole, Jennifer Ratkie, Richard Craig, Mario Riley, Randy Billington, Rick Carroll, Clayton, Blogren, Zimmerman, Goodman, Powers and Zinno are DISMISSED from this case for lack of personal involvement in the alleged violation of plaintiff's constitutional rights.

3. Plaintiff is responsible for serving his complaint upon the defendants. A memorandum describing the procedure to be followed in serving a complaint on individuals in a federal lawsuit is attached to this order, along with 4 copies of plaintiff's complaint and blank waiver of service of summons forms.

4. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

5. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 31st day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge