

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

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JOSE BORRERO,

Petitioner,

ORDER

v.

05-C-418-C

JAMES GREER, ROBERT BREVARD,  
BARBARA RIPANI and ANN SEMROW,  
sued in their official capacities,

Respondents.  
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This is a proposed civil action for declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, 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.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See 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).

Petitioner contends that respondents violated his rights under the Eighth Amendment by failing to provide him a "dental partial" to alleviate his pain. Petitioner will be granted leave to proceed in forma pauperis on his claim against respondents Brevard, Ripani and Semrow. He will be denied leave to proceed on his claim against respondent Greer.

In his complaint, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner Jose Borrero is a Wisconsin state inmate housed at the Columbia Correctional Institution in Portage, Wisconsin. Respondent Robert Brevard is a dentist at Columbia Correctional Institution; respondent Barbara Ripani is a supervisory dentist at Columbia Correctional Institution; respondent Ann Semrow is manager of the Health

Services Unit at Columbia Correctional Institution; and respondent James Greer is Medical Director of the Bureau of Health Services at the Department of Corrections.

Petitioner has four front teeth missing. In mid October 2004, while he was confined at the Wisconsin Resource Center, a dentist recommended he receive a “dental partial.” After he was transferred to the Columbia Correctional Institution in mid November, petitioner informed respondent Brevard that a dentist at the Wisconsin Resource Center had recommended he get a partial plate so that he could eat properly. Petitioner told Brevard he was beginning to experience pain and irritation to his gums when he ate, but Brevard told petitioner, “I don’t make those kind of partials. They are for looks only.”

In late January 2005, petitioner filed an offender complaint stating:

I am being denied partials from the dentist. I have written numerous requests and I continually receive the same response. I have pain when I eat because the food irritates my gums.

A department of corrections examiner contacted respondent Brevard regarding petitioner’s complaint, and on February 3, 2005, she reported the following:

Dr. Brevard states that these appliances do further damage to the teeth and gums and are only meant for temporary use. They do not meet the standard of dental care by the WI board of licensing and therefore will be denied. In addition, in corrections cosmetic work is not allowed and Dr. Brevard stated that is the purpose of this item.

Respondent Brevard did not examine petitioner before he made the statements. Petitioner’s complaint was dismissed following his appeal and a copy of the dismissal notice

was sent to respondents Brevard, Ripani and Semrow.

On February 15, 2005, petitioner was transferred to the Jackson Correctional Institution. On February 16, 2005, he submitted a dental service request to prison officials at Jackson requesting partial dentures. That same day petitioner was informed in writing that he was on a wait list for partials. On February 22, petitioner submitted another dental service request addressed to respondent Greer, stating that he had been denied partials and had pain when eating. The same day, the same Jackson staff member who responded to petitioner's February 16 request responded again, in writing, that petitioner was on a wait list for partials and had to wait his turn.

In March 2005, petitioner was transferred to the Wisconsin Resource Center, and in April he was transferred again to the Columbia Correctional Institution. Upon his arrival at Columbia, petitioner informed respondent Brevard that he was still having pain and discomfort in his gums and was not able to eat properly. Respondent Brevard's response was to say, "Too bad."

On May 8, 2008 petitioner submitted a dental service request asking for partials, even if just for temporary use while eating. Respondent Brevard replied in writing that "Flippers aren't for eating. They're just for appearance."

Petitioner wrote a letter to respondent Semrow, who is the manager of the Health Services Unit at the Columbia facility, explaining that he had pain when he ate and that he

had been told by a dentist at another correctional facility that he was eligible for a partial.

On May 16, 2005 respondent Semrow sent petitioner the following letter:

I have received your request for partials. The BHS DOC policy does authorize the making of partials and full dentures when recommended by the dentist. Your case will be reviewed and to ensure that the policy is being followed, not everyone is a candidate for this service. Please be patient as this review will take time.

On two instances, in May and June 2005, the warden of the Columbia Correctional Institution wrote the petitioner, advising him to contact respondent Semrow or respondent Green regarding the denial of his dental partial. Respondent Semrow was sent copies of both of those letters.

On June 2, 2005, petitioner filed another offender complaint, stating that he was in pain and that the dentists at Columbia were not seeing him or resolving his problem. A corrections complaint examiner contacted respondent Semrow regarding the complaint. After respondent Brevard examined petitioner, the complaint examiner dismissed his inmate complaint on the ground of deference to respondent Brevard's professional opinion. A copy of the notice of dismissal was sent to respondents Semrow and Ripani.

On June 10, 2005, respondent Brevard examined petitioner and wrote: "Patient says he has pain in 9 & 10 area. No inflammation or swelling in the area." On the same day petitioner filed another inmate complaint, alleging that respondent Brevard had been deliberately indifferent to his serious dental needs. A corrections complaint examiner

contacted respondent Semrow, who advised the examiner that

the complainant's dental issues are currently under review by Dr. Ripani. The complainant has been seen and assessed by Dr. Brevard. The complainant will now have to wait for a decision from Dr. Ripani. . . . The complainant's concerns are documented and will be reviewed by Mr. Greer, Director of BHS, or his designee who will decide the outcome of this complaint.

On or about June 29, 2005, petitioner received respondent Ripani's response, which was, "You are not eligible for a partial due to poor dental hygiene."

Earlier, on June 14, 2005, petitioner filed a health service request stating that he hadn't eaten in four days because eating caused pain, irritation and discomfort to his gums. Petitioner also asked to be put on "Resource" (liquid nutrient) so he would not have to eat solid foods. Respondent Brevard responded in writing:

No partial will be made for your mouth. You have gingivitis and partials will only make your gums hurt more. The type of partial that fits the front teeth area will not stay in place for biting. Resource is not necessary as you can chew with your many back teeth.

On June 16, 2005, petitioner filed another health service request form reiterating his concern that it caused him pain to eat. Respondent Brevard's written response to his request was: "I checked your gums and found no sores and no irritation from food. No special diet will be ordered."

Petitioner asserts that he does not have gingivitis or poor dental hygiene and that respondents Brevard and Ripani are fabricating excuses to refuse to provide him with a

partial.

## DISCUSSION

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

“Serious medical needs” encompass (1) conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and (3) conditions that have been “diagnosed by a physician as mandating treatment.” Gutierrez, 111 F.3d at 1371-73. Petitioner’s allegations suggest that he experiences severe pain while eating, including soreness and discomfort in his gums. These allegations of pain and suffering are sufficient to suggest a serious dental condition. Gutierrez, 111 F.3d at 1372 n.7 (given liberal pleading standards for pro se complaints, “the ‘seriousness’

determination will often be ill-suited for resolution at the pleading stage”).

To show deliberate indifference, petitioner must establish that a respondent 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). Although a negligent or inadvertent failure to provide adequate medical or dental care does not amount to deliberate indifference because such a failure is not an “unnecessary and wanton infliction of pain,” Estelle, 429 U.S. at 105-06, a prison official need not have intended or hoped for the harm that the inmate suffered in order to be held liable under the Eighth Amendment. Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996).

The Court of Appeals for the Seventh Circuit has held that to recover damages under § 1983, a petitioner must establish each respondent's personal responsibility for the claimed deprivation of a constitutional right. A respondent's direct participation in the deprivation is not required. Instead, an official satisfies the personal responsibility requirement "if she acts or fails to act with a deliberate or reckless disregard of petitioner's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). In order for a supervisory official to be found liable under §1983, there must be a " causal connection, or an affirmative link, between the misconduct complained of and the official sued." Smith v. Rowe, 761 F.2d at 369;



Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983).

Petitioner's claim that respondent Brevard refused to provide him with a dental partial to alleviate his pain and discomfort is sufficient as an allegation of deliberate indifference by someone who was personally involved in his dental treatment. I will allow petitioner to go forward on this claim against respondent Brevard.

Petitioner's claim that respondents Semrow and Ripani failed to insure that he received appropriate dental care is sufficient as an allegation of deliberate indifference by individuals who were aware of his deficient treatment but did not intervene to secure him proper treatment. I will allow petitioner to go forward on this claim against respondents Semrow and Ripani.

However, petitioner does not allege any facts to suggest how respondent Greer might have been involved personally in the alleged denial of dental care. Petitioner addressed a dental service request form to respondent Greer on February 22, 2005, detailing his dental condition, but a Jackson Correctional Institution staff member responded to that letter, informing petitioner that he was on a wait list. Similarly, even though some of petitioner's inmate complaints were dismissed by the Bureau of Health Services of the Department of Corrections (where respondent Greer is the Medical Director), nothing in petitioner's allegations suggests that respondent Greer personally reviewed any of the complaints. Even if he did see the recommendation for dismissal, nothing in those recommendations would

have made it obvious to respondent Greer that respondent Brevard or any other prison official was ignoring a serious dental need.

I emphasize that this decision to allow petitioner to proceed with his claim against respondents Brevard, Ripani and Semrow is based on petitioner's allegations that these respondents have intentionally fabricated reasons to deny him his requested dental treatment, that his medical needs are serious and painful and that they could be alleviated by the provision of a partial plate. At this stage of the proceedings I have no choice but to accept petitioner's allegations as true and therefore to allow petitioner to proceed against three of the respondents. However, for petitioner to prevail in his claim against each respondent, he will have to show that each of them was deliberately indifferent to his serious dental need. Instances of difference of professional opinion are not considered violations of the Eighth Amendment duty to provide for prisoners' serious medical needs. Even conduct that would constitute professional malpractice is not actionable unless it amounts to deliberate indifference to plaintiff's medical needs.

## ORDER

IT IS ORDERED that

1. Petitioner Jose Borrero is GRANTED leave to proceed on his claims that respondents Brevard, Ripani and Semrow violated his Eighth Amendment rights by refusing to respond to his serious dental need.

2. Petitioner Jose Borrero is DENIED leave to proceed on his claim that respondent Greer violated his Eighth Amendment rights by failing to secure him dental partials.

3. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. 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 \$250; petitioner is obligated to pay this amount when he has the means to do so, 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 petitioner's complaint and this order are being sent today to the Attorney

General for service on the state respondents.

Entered this 19th day of August, 2005.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge