IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT E. ADSIT,

Petitioner, ORDER

v. 05-C-579-C

DR. ROMAN KAPLAN, GLEN
HEINZL, THOMAS EDWARDS,
JUDY SMITH, CATHERINE FERRY,
CANDICE WARNER, JAMES GREER,
SHARON ZUNKER and MATTHEW FRANK,

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the New Lisbon Correctional Institution in New Lisbon, 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 with adequate medical care when they denied his requests to see a doctor outside the prison for his pain and when they prescribed him the wrong medication. Also, petitioner contends that it is the practice of the Department of Corrections to deny inmates medical care because of the cost of such care.

The allegations of petitioner's complaint are difficult to interpret and appear in important respects to conflict with information contained in the attachments to the complaint. Therefore, I have recited verbatim the factual statements petitioner made in the complaint about his medical care, as well as the responses prison officials made to petitioner's complaints during the administrative process concerning the same subject.

ALLEGATIONS OF FACT

A. Parties

Petitioner Robert Adsit is a Wisconsin state inmate housed at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Respondent Roman Kaplan is a doctor at the Oshkosh Correctional Institution; respondent Thomas Edwards is the manager of the health services unit at the Oshkosh Correctional Institution; respondent Judy Smith is the warden at the Oshkosh Correctional Institution.

Respondent Glen Heinzl is a doctor at the New Lisbon Correctional Institution; respondent Catherine Ferry is the warden at the New Lisbon Correctional Institution; respondent Candice Warner is the manager of the health services unit at the New Lisbon Correctional Institution.

Respondent James Greer is the director and respondent Sharon Zunker is a coordinator of the Department of Corrections Bureau of Health Services. Respondent Matthew Frank is Secretary of the Department of Corrections.

B. Petitioner's Factual Allegations

> This case is about delaying medical illness, and resulted into permanent injuries and prescribed wrong medications!! And swollen eyes, bleeding at my liver/kidneys.
>
> On or about March 2004, Pt. was have serious pain in his private area. I pt.

continually to request to def. Kaplan that I was in pains and that I would like to go to an outside hospital or a second hand opinion. This def. refused me to be allowed for this pain condition and as of result I received permanent damages. He had stated that D.O.C. would "not" pay for "any" thing!

Glen Heinzl, M.D. "knew" I was in pains and yet this def. totally ignored by pains. I begged this def. to please let me go to an outside hospital. He said no and as of a result pt. received permanent injuries.

Thomas Edwards knew I was in "severe" pains by my requesting to be seened by CO/def. Roman Kaplan and by my request of records and yet he also refused.

Judy Smith "knew" my conditions but failed to contact the elite D.O.C. members when I was being denied treatment.

Candace Warner "knew" that def. Heinzl prescribed pt. the wrong medications, without instructing the pt. of side effects and yet she did nothing. She Warner, even failed to arrange an appointment to UW Madison. She def. Warner and Heinzl knew without justification when they prescribed meds that caused me pains at my liver, stomach, kidney.

Elite D.O.C. members Mathew Frank, James Greer, Sharon Zunker, Catherine Farrey all "knew" that the D.O.C. policy was discriminatory. You must treat all the "sick" regardless of the cost. They failed to prepare a reasonable policy.

Pt. was prescribed medication for his cancer on his penis that was wrongly prescribed. It caused pt's penis to swelled - badly, bleeding, when in fact def. Heinzl, Warner "knew" I should not have been prescribed this antibiotic. Defendants caused me more unnecessary pains and suffering. Pt. could not stop bleeding and pains so he immediately contacted HSU on 9-19-05. And non-NC2 checked my penis. She and def. Heinzl and both "agreed" and informed me that they had prescribed the "wrong" meds. And they have to change it cause it caused more bleeding and swollen of the penis. This Hon. Ct. must stop these defendants. I am in constant pains. Defs. are deliberately causing unnecessary pain which are making me suffer severely. Plaintiff's eye is so swollen he could only see out of one eye from the wrong medications that

was misprescribed wrongly! Please check attached documents to the complaint dated 9-19-05. Eye medications caused me not to see for many days, weeks. Stomach, liver, kidney pains. Check photo (attached) of eye injury.

There is no such rule that the Elite D.O.C. members that an inmate have to need money in order to get treatment medical when in very severe pains at his private parts. Defs. failed to act out medical policies when it is an emergency situation. The 8th Amendment prohibits cruel and unusual punishment imposes a duty on prison officials also must take reasonable measures to guarantee an inmate's safety. Def. should not have been delayed so long! 18 months is too long to delay someone before deciding to "treat" any one human being for severe pains at his stomach testicles, liver/kidney, penis privately. This was an deliberate act they knew that I was in pains and did nothing about it.

On August 11, 2005, petitioner filed an offender complaint at the New Lisbon facility, stating:

I begged doctor Kaplan (OSCI), Dr. Heinzl (NLCI) to please allow me to get a second hand opinion for my pains that I was having at my penis. Now as of that delays I received damage to my internal organ. I should have been saw an outside doctor I have cancer now.

The complaint examiner issued the following response to petitioner's complaint:

Inmate states that he has cancer because Dr. Kaplan and Dr. Heinzl refused to take his concerns seriously. Ms. Warner and this examiner reviewed the inmate's medical chart. Inmate Adsit arrived at NLCI on 12/18/04. He was first seen by HSU on 02/28/05 for concerns related to his penis. On 2/28/05, Dr. Heinzl submitted and received approval for a consultation with UW Hospital-Urology. On 06/03/05, the inmate was seen by the Urologist who recommended surgery. On 07/21/05, the inmate was seen for his pre-operative physical and surgery was conducted on 07/27/05. The inmate was seen by NLCI HSU staff upon return from the hospital on 07/27/05 and by Dr. Heinzl on 07/29/05. The inmate received a CT scan and physical exam on 08/11/05. His chart has been flagged to be reviewed by Dr. Heinzl for

> referral to Dermatology based on the recommendation of the Urology report. Ms. Warner and this examiner also reviewed the inmate's chart going back to 2003 (prior to his arrival at NLCI). Per the chart notes, Inmate Adsit never requested to be seen relating to penile problems. Per the inmate's chart notes, the inmate requested to be seen for the first time on 2/28/05 at which time the referral to UW Hospital was made.
>
> While the inmate makes it clear that he is not satisfied with the care offered, the type of specific care or treatment are matters of professional medical judgment. Those judgments have been made as they pertain to the inmate's medical concerns. The ICE is not in a position to question that. Based on the above, recommendation is made to dismiss this complaint.

On August 22, 2005, the reviewing authority accepted the complaint examiner's recommendation and dismissed petitioner's complaint. On August 25, 2005, petitioner appealed the dismissal, stating:

> My argument is that I was at OSCI first, and doctor Kaplan would not allow me to get a second opinion, for my pain, which resulted into permanent injuries, once arriving here at NLCI Doctor Heinzl also refused by delaying my medical treatment. This was brought to Dr. Heinzl's attention on 2-28-05. I was not sent out for a second opinion until 6-03-05. 4 months after the facts, which could have prevented the cancer. This makes both doctors liable for the permanent damage I received.

The reviewing authority dismissed petitioner's appeal on August 26, 2005, noting that "complainant filed no complaints while at OSCI regarding this issue."

> On August 12, 2005, petitioner filed an inmate complaint in which he wrote:
>
> I have been prescribed medication that have been causing me adverse side effects toward my internal organ. This must change appropriately.

The complaint examiner rejected petitioner's complaint, stating:

> Inmate Adsit complains that he is having side effects from medication. He failed to list what side effects he was having or what medication he believes to be causing the problems.
>
> Rejected pursuant to DOC 310.11(5)(c), Wis. Adm. Code, because "the inmate does not allege sufficient facts upon which redress may be made."

Petitioner requested review of his rejected complaint on August 18, 2005, writing:

> The ICE investigator did not properly investigate. I am on medication and all the medications are causing liver/kidney, stomach, weakness, which I can't get up in the morning. These medications must be corrected. I ask you to please talk with Dr. Heinzl about this.

On September 7, 2005, the appeals reviewer affirmed the complaint examiner's rejection of petitioner's complaint, stating that "inmate is encouraged to address his medical concerns and alleged side effects with medical staff."

DISCUSSION

A. Eighth Amendment Standard

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 alleges that he experienced severe pain in his penis, stomach, liver and kidneys and that he was eventually diagnosed with penile cancer. There is no question that petitioner suffered from a serious medical condition.

To establish deliberate indifference, a petitioner must allege facts from which an inference may be drawn 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). Negligent or inadvertent failure to provide adequate medical 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. Moreover, 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).

B. Medical Care for Complaints of Pain

In screening a petitioner's complaint, the court is to construe petitioner's allegations liberally in favor of the petitioner. However, in this case, it is extremely difficult to understand precisely what petitioner's complaint is regarding his medical care, because his poorly written allegations are subject to widely different interpretations.

For example, it is possible to interpret petitioner's allegations about his attempts to obtain medical care for his pain to be simple assertions that respondents respondents Kaplan, Heinzl, Edwards and Smith refused to arrange for petitioner to go outside the prison to obtain a second opinion about his condition; respondents Kaplan and Heinzl were unskilled in recognizing the medical cause of petitioner's pain; and respondents Frank, Greer, Zunker and Farrey knew that the Department of Corrections' policy governing medical care would not cover the costs of a second opinion. However, it is possible also to interpret these same assertions as a claim that respondents "totally ignored" petitioner's repeated complaints of serious pain for 18 months and refused to give petitioner "any thing" because the Department of Corrections would not pay for it.

If petitioner's claim is that he was refused the opportunity to obtain a second opinion, it fails at the outset. Neither persons who are incarcerated nor persons in the free world have a constitutional right to second opinions about their medical concerns. Indeed, it is not constitutionally required that a prisoner's health care be 'perfect, the best obtainable, or even

very good.'" Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991) (quoting Brown v. Beck, 481 F. Supp. 723, 726 (S.D. Ga. 1980)); Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985) (state has affirmative obligation under Eighth Amendment to provide persons in custody with medical care that meets minimal standards of adequacy).

However, if petitioner is saying that respondents Kaplan, Heinzl, Edwards and Smith knew about his pain for 18 months and Kaplan and Heinzl deliberately refused to examine him or attempt to diagnose the cause and Edwards and Smith did nothing about it and, outlandish as it might seem, that respondents Frank, Green, Zunker and Farrey endorsed a policy under which the department refused to pay for any part of petitioner's medical care, then petitioner's allegations would be sufficient to state an Eighth Amendment claim that he was subjected to "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 105-06.

Similarly, petitioner's allegations that he was given the wrong medication might be interpreted in one of at least two ways. They may be understood as alleging that respondent Heinzl made a mistake when he ordered a prescription for petitioner that caused petitioner to suffer an allergic reaction and that respondent Warner failed to arrange immediately for petitioner to see a doctor outside the prison to treat the reaction. Alternatively, it is possible that petitioner is alleging that respondent Heinzl deliberately prescribed petitioner medication that caused him to suffer an allergic reaction and that respondent Warner knew

Heinzl was engaging in such misconduct and refused to take any action to prevent it.

If petitioner is alleging that respondent Heinzl made a mistake when he prescribed petitioner pills that caused him to suffer an allergic reaction, his claim does not rise to the level of a constitutional violation. A doctor's failure to accurately prescribe medication might constitute negligence, but medical malpractice and negligence are state law claims appropriately resolved in state court. These are not claims arising under federal law or the Constitution. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Id. at 106. Likewise, for the reasons described above, respondent Warner's failure to arrange for petitioner to see a doctor outside the prison about his allergic reaction would not be actionable in this court. However, if a doctor were to deliberately prescribe medication for an inmate for the very purpose of causing him to suffer an allergic reaction, his act would constitute an act that is "repugnant to the conscience of mankind." Id. Such allegations would support an Eighth Amendment claim.

Making it even more difficult to interpret correctly petitioner's assertions that he was denied medical treatment for 18 months is the existence of information contained in the institution complaint examiner's recitation of the results of the investigation into petitioner's inmate complaint on the subject. This information squarely contradicts petitioner's allegations that he was denied all medical treatment. According to the inmate complaint examiner, petitioner's medical records do not reflect that petitioner ever saw respondent

Kaplan for penile pain. In addition, the records reveal that petitioner saw respondent Heinzl for the first time on February 28, 2005, and that the same day Heinzl referred petitioner to a urologist at the University of Wisconsin hospital, where petitioner was treated for penile cancer.

Perhaps the contradictions between the facts alleged in petitioner's complaint and the information contained in the attachments to the complaint are explained by the fact that petitioner did not draft his complaint personally and possibly did not read it before he signed it. This court has become aware that petitioner's complaint is written in the same hand and in the same style as complaints filed in the Western and Eastern Districts of Wisconsin by a frequent filer named Larry Ray Holman, who is housed at the New Lisbon Correctional Institution with petitioner. It may be that Mr. Holman did not accurately understand the facts before he wrote them in petitioner's complaint or that he purposely described them loosely so as to avoid dismissal of the claims at the screening stage. Whatever the scenario, petitioner should be aware that by signing a complaint to be filed in federal court, he is representing to the court that, to the best of his knowledge, his factual contentions have evidentiary support, that is, they are true. Fed. R. Civ. P. 11(b)(3). If he is not truthful and his lack of candor is brought to light during the course of this lawsuit, he may be subject to sanctions under Rule 11.

Because the attachments to petitioner's complaint tell one story and the factual

allegations in petitioner's complaint appear to tell another story, rather than simply dismiss the proposed complaint for failure to comply with Rule 8, I will stay a decision whether to grant petitioner leave to proceed in this action to allow petitioner to supplement his complaint with a written statement in his own hand answering the following questions:

1. When and where did you complain to respondent Kaplan about your pain?

2. At the time you complained, did respondent Kaplan examine you or talk with you about your symptoms?

3. Did respondent Kaplan ever prescribe pain medication for you or advise you to purchase pain relievers at the canteen?

4. What specifically did respondent Kaplan do or fail to do that supports your contention that he "did nothing" to care for your medical needs for 18 months?

5. When did respondent Edwards learn of your complaints of pain?

6. What specifically did respondent Edwards do or fail to do that supports your contention that he "did nothing" to care for your medical needs for 18 months?

7. When did respondent Smith learn of your complaints of pain?

8. What specifically did respondent Smith do or fail to do that supports your contention that she "did nothing" to insure your medical needs were being met?

9. Did you complain to respondent Heinzl about your penile pain before February 28, 2005? If so, when and where did you complain to him and what was his response?

10. Do you deny that respondent Heinzl made an appointment for you to see a urologist at the University of Wisconsin and that you were treated at the hospital for your cancer?

11. What specifically did respondent Heinzl do or fail to do that supports your contention that he "did nothing" to care for your medical needs?

12. Is it your contention that respondent Heinzl deliberately prescribed you a medication that he knew would cause you to suffer an allergic reaction? If so, what makes you think so?

13. Is it your contention that respondent Warner knew in advance that respondent Heinzl was going to prescribe you a medication that he knew would cause you to suffer an allergic reaction and that she took no steps to stop Heinzl's action? If so, what makes you think so?

14. Is it your contention that a Department of Corrections policy exists that forbids prison officials from providing you any and all treatment for your medical needs because of the cost? If so, what makes you think so?

15. Is it your contention that it is a policy of the Department of Corrections to refuse to cover the costs of "second opinions" from doctors outside the prison when an inmate requests such consultations?

C. Appointment of Counsel

On October 5, 2005, petitioner filed a motion for appointment of counsel. Petitioner's motion will be denied as premature. If and when the court grants petitioner leave to proceed in forma pauperis on one or more of his claims against respondents, petitioner may renew his motion for appointment of counsel.

ORDER

IT IS ORDERED that

1. A decision is STAYED on petitioner Robert Adsit's request for leave to proceed in forma pauperis on his claims in this lawsuit. On or before December 12, 2005, petitioner is to submit a statement in his own hand supplementing his complaint with answers to the questions set forth in this order. If, by December 12, 2005, petitioner fails to clarify his claims against the respondents in the required supplemental pleading, I will deny his request for leave to proceed in forma pauperis for his failure to set out his claims in clear and plain language as required by Fed. R. Civ. P. 8.

2. Petitioner Robert Adsit's motion for appointment of counsel is denied as premature.

Entered this 30th day of November, 2005.

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