

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

ROBERT STANLEY DuROSS,

Petitioner,

v.

LINDA KENNEDY, DR. DASGUPTA
and RICK KALSON,

Respondents.

ORDER

05-C-79-C

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Oakhill Correctional Institution in Oregon, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Initially, petitioner named only the state of Wisconsin as a defendant but I informed him in an order dated March 28, 2005, that the state was not a “person” subject to suit under § 1983 and gave him leave to amend his complaint to identify the prison officials he believed were personally involved in the wrongs about which he complained. Petitioner filed a timely amended complaint that sets out viable claims under the First and Eighth Amendments.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Robert DuRoss is a Wisconsin state inmate housed at the Oakhill Correctional Institution in Oregon, Wisconsin. Respondent Linda Kennedy is a corrections officer; respondent Dasgupta is a doctor; and respondent Rick Kalson is a sergeant. (I am assuming that all three respondents are employed at the Oakhill facility.)

Petitioner was transferred to the Oakhill Correctional Institution on December 29, 2004. At some earlier time he had had surgery on his back and had been prescribed pain medication. On December 30, 2004, he sent a slip to the Oakhill facility health services unit requesting an extra mattress and complaining that his pain medication had been changed when he was transferred. Petitioner noted that lying on the hard mat and steel plate provided as a bed was causing him back pain, which caused his temporomandibular joint disorder to flare up, which in turn caused him earaches and migraine headaches. Respondents Kennedy and Dasgupta refused to give petitioner his prescribed pain medication and an extra mattress and respondent Kalson denied petitioner's request for an extra mattress.

Petitioner continued to send the health services unit requests for pain medication. The unit staff told him that he would have to make a co-payment if he wanted to see a doctor. Petitioner responded that he was unable to pay the required co-payment. On January 4, 2005, petitioner filed inmate complaint No. OCI-2005-690 in which he

complained about the required co-payment. The response he received to his inmate complaint did not address the problem he described. In addition, respondent Kennedy wrote petitioner a major conduct report because of the grievance he filed; in the conduct report, respondent Kennedy indicated that petitioner had acted disrespectfully toward prison staff. To date, petitioner has not received an extra mattress or his prescribed pain medication and he continues to experience significant back pain.

DISCUSSION

A. Eighth Amendment

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 has a back condition for which he has had surgery and been prescribed pain medication. These allegations are sufficient to suggest that he suffers from a serious medical condition. Estelle, 429 U.S. at 107 (allegations of severe back pain presumed to be sufficiently serious for Eighth Amendment claim); see also 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 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 hope 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). Petitioner’s allegation that respondents Kennedy and Dasgupta refused to provide him his prescribed pain medication is sufficient as an allegation of deliberate indifference. Walker v. Benjamin,

293 F.3d 1030, 1040 (7th Cir. 2002) (well-established that refusal to provide inmate with prescribed pain medication gives rise to claim of Eighth Amendment deliberate indifference to serious medical needs).

Although it is a closer question whether petitioner's allegations that respondents Kennedy, Dasgupta and Kalson denied him an extra mattress suggest deliberate indifference, I will allow petitioner to go forward on this claim. "If petitioner can show that the denial of an extra mattress . . . cause[d] him pain and that the reason officials have denied him these accommodations is that they are deliberately indifferent to his health, he may be able to prove that they have violated the Eighth Amendment." Franklin v. McCuaghtry, 02-C-618-C (W.D. Wis. Jan. 29, 2003). However, to prevail on this claim petitioner will have to show that he experienced more than just discomfort. Id. (citing Rhodes v. Chapman, 452 U.S. 337, 349 (1981) ("[T]he Constitution does not mandate comfortable prisons.")). In addition, petitioner must prove that officials were aware that of a substantial risk of serious pain; an Eighth Amendment violation will not lie if respondents were not aware of petitioner's medical need for a second mattress.

B. 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). 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). To state a claim for retaliation, a petitioner need not allege a chronology of events from which retaliation could be plausibly inferred. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). However, he must allege sufficient facts to put the respondents on notice of the claim so that they can file an answer. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). This minimal requirement is satisfied where a petitioner specifies the protected conduct and the act of retaliation. Id.

As for petitioner’s constitutionally protected activity, he alleges that he filed inmate grievance No. OCI-2005-690 in which he complained about the medical co-payment requirement. “Prisoners’ grievances, unless frivolous, concerning the conditions in which they are being confined are deemed petitions for redress of grievances and thus are protected by the First Amendment.” Hasan v. United States Dept. of Labor, 400 F.3d 1001, 1005 (7th Cir. 2005) (additional citations omitted). In addition, petitioner has specified the alleged act of retaliation on which he grounds his claim; petitioner alleges that respondent Kennedy wrote him a conduct report in retaliation for the inmate complaint he filed. Although petitioner’s allegations suggest that respondent Kennedy issued petitioner a conduct report not because he had filed a grievance but because he done so in a manner that was disrespectful toward prison staff, in which case petitioner’s claim will fail, id. (prison

officials did not violate inmate's First Amendment right by issuing conduct report for lying where accusations in his inmate grievance were not true), I will grant petitioner leave to proceed on his First Amendment retaliation claim. Petitioner has satisfied the pleading requirements and may be able to prove that respondent Kennedy acted in retaliation for petitioner's exercise of his First Amendment right to file grievances about prison conditions.

ORDER

IT IS ORDERED that

1. Petitioner Robert DuRoss is GRANTED leave to proceed on his claims that respondents Linda Kennedy and Dr. Dasgupta violated his Eighth Amendment rights by denying him his prescribed pain medication, that respondents Kennedy, Dasgupta and Rick Kalson violated his Eighth Amendment rights by denying him a second mattress for his back and the respondent Kennedy retaliated against him for filing an inmate grievance by issuing him a conduct report in violation of his First Amendment rights.

2. 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.

3. 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.

4. The unpaid balance of petitioner's filing fee is \$242.77; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

5. 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 18th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge