

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

JEFFREY L. TORKELSON,

Petitioner,

v.

SAINT JOSEPH'S HOSPITAL;
MINISTRY HEALTH CARE;
SANJAY C. RAO, M.D.

Respondents.

OPINION AND
ORDER

06-C-83-C

This is a proposed civil action for monetary relief. Petitioner Jeffrey L. Torkelson, 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 Saint Joseph's Hospital, Ministry Health Care and Dr. Sanjay C. Rao were negligent during petitioner's surgery and post-operative care and caused him physical harm. Although petitioner's allegations are serious, he cannot proceed in forma pauperis in this court on his claim because it is not a federal law claim over which this court has jurisdiction.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Jeffrey L. Torkelson is a Wisconsin state inmate housed at the Columbia Correctional Institution in Portage, Wisconsin. Respondent Saint Joseph's Hospital is a hospital in Marshfield, Wisconsin. Respondent Sanjay C. Rao is a medical doctor at Saint Joseph's Hospital. (Although petitioner has not said so, it appears that Ministry Health Care

provides medical services at Saint Joseph's Hospital).

On February 5, 2004, petitioner was admitted to Saint Joseph's Hospital for neck surgery. The surgery was meant to help petitioner regain feeling in his arms and hands and was performed on the day of admission. Petitioner was kept in the hospital for an extra day because of post-operative complications (petitioner developed a large hematoma on the right side of his neck). After the surgery, he was served a hospital meal that consisted of steak, even though respondent Rao had placed him on a soft-foods diet. Petitioner felt a sharp pain on the right side of his neck as he tried to swallow the steak. His neck immediately began to swell and bruise, causing petitioner to choke. Respondent Rao explained to petitioner that this incident was a normal consequence of his surgery.

On February 7, 2004, petitioner was released from the hospital. After his return to the Columbia facility, he began to experience difficulty swallowing. He was seen at the Good Samaritan Hospital in Merrill, Wisconsin. Doctors at the Good Samaritan Hospital diagnosed petitioner with dysphagia, a condition he did not have prior to the surgery. Also, petitioner developed a lump on the right side of his throat and nerve damage along the right side of his neck. Since the surgery, petitioner has continued to experience numbness and tingling in his arms and hands and also experiences some neck pain that he did not have before the surgery. Petitioner had undergone a similar surgical procedure on his neck in 1994 and had not suffered any complications.

DISCUSSION

In his complaint petitioner does not specify what laws he believes respondents are guilty of violating. However, I can infer from petitioner's allegations that he is accusing respondents of having been negligent during or after his neck surgery on February 5, 2004. This is a state law claim. Petitioner asserts in the complaint that "[t]his court has jurisdiction over state law claims pursuant to 28 U.S.C. § 1367(c)." Petitioner is correct that federal courts may exercise supplemental jurisdiction over certain state law claims pursuant to 28 U.S.C. § 1367, but this is true only when the lawsuit has a substantial federal claim and the facts of the federal claim overlap the facts of the state claim so that it makes sense to try them in one proceeding. Mine Workers v. Gibbs, 383 U.S. 715 (1966). There is no federal claim in the present case. Petitioner has not suggested that respondents violated a federal law or statute or suggested that respondents are state actors who violated one of his constitutional rights. Therefore, I am not authorized to exercise jurisdiction over his state law claim. Petitioner will be denied leave to proceed in this court on his negligence claim. He remains free to pursue it in state court.

ORDER

IT IS ORDERED that

1. Petitioner Jeffrey L. Torkelson is DENIED leave to proceed on his claim that respondents Saint Joseph's Hospital, Ministry Health Care and Sanjay C. Rao were negligent;

2. The unpaid balance of petitioner's filing fee is \$238.21; 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);

3. A strike will not be recorded against petitioner because I am declining to exercise supplemental jurisdiction over his state law claim; thus I did not dismiss the action for one of the reasons set forth in 28 U. S.C. § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 23d day of March, 2006.

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