IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CLAYTON H. MELLENDER,

Petitioner,

OPINION AND ORDER

v.

06-C-266-C

DANE COUNTY; PRISON HEALTH SERVICES at Dane County Jail; NURSE SHAYA DOE (Last Name Unknown); NURSE JANE DOE (Nurse who withheld medication at Dane County Jail); DEPUTY SKINNER; CAPTAIN MIKE PLUMER; SHERIFF GARY HAMBLIN[1],

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, Clayton Mellender, who is presently confined at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, asks for leave to proceed in forma pauperis under 28 U.S.C. § 1915. Petitioner contends that respondents violated his rights under either the Eighth Amendment or the Fourteenth Amendment by withholding pain medication from

[1]The original caption in this case incorrectly named the Dane County sheriff as Craig Hanson.

him after he violated a jail rule. Jurisdiction is present under 28 U.S.C. § 1331.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 previously 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. Typically, if respondents believe that petitioner has not exhausted the administrative 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).

After examining petititioner's proposed complaint, I conclude that his allegation does not state a constitutional claim because, by his own admission, any injury he may have suffered occurred as the result of his own actions. Therefore, petitioner will be denied leave to proceed in forma pauperis. Because I will dismiss his complaint, petitioner's motion for

appointment of counsel will be denied as moot.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Clayton H. Mellender is an inmate of the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Respondents include the health services unit and various staff at the Dane County jail located in Madison, Wisconsin. Respondent Shaya Doe (last name unknown) is a charge nurse at the jail, respondent Jane Doe (name unknown) is a nurse, respondent Skinner is a deputy and respondent Mike Plumer is a captain at the jail; respondent Gary Hamblin is the Sheriff of Dane County.

On August 30, 2004, petitioner was housed in the segregation unit of the Dane County jail. At 1:00 p.m., respondent Jane Doe entered the segregation cell block to administer medication. Petitioner was wearing required jail uniform pants, but had removed his shirt because it was "foul, dirty, [and] malodorous."

Respondent Skinner told petitioner to put on his shirt out of respect for respondent Doe. Petitioner replied that his "shirt st[unk] and the nurse ha[d] undoubtedly seen many male chests." Respondent Doe told petitioner that if he didn't put on his shirt, he would not receive any medication. Petitioner told her that withholding medication for not wearing a shirt is illegal. Respondent Doe left without giving petitioner his pain medication. At some

point before respondent Doe left, petitioner asked for her name so he could file a grievance against her. She refused to tell him her name. When petitioner complained further, respondent Shaya Doe stated that her policy was that "inmates can have medication refused if not fully dressed."

On September 3, 2004, petitioner filed a grievance (#3493), contending that he should have been given his medication and that respondent Doe should have told petitioner her name. On September 13, 2004, Lieutenant Schuetz of the Dane County jail substantiated petitioner's grievance, stating:

> The nurse should have given you your medication. The deputy should have issued minor discipline or written you up for a jail rule violation. Inmates are instructed to be in full jail uniform during the passing of medication. Jail rule 1, c. states, "You will follow all staff directions." Additionally, jail rule 15, b. states, "You will properly wear the issued jail uniform, including footwear, when required by staff." The nurse should have given you your medication.

Also, the grievance response form indicated that appropriate action would taken to remedy the situation. Petitioner heard later that respondent Doe had been fired shortly after he filed his grievance.

Petitioner appealed the response to his grievance, dissatisfied because Lieutenant Schuetz hadn't addressed his complaint that respondent Doe had not told him her name. On September 20, 2004, Lieutenant Schuetz responded to the appeal, stating "Your initial grievance was already sustained. The nurse should have provided you with her first name."

DISCUSSION

Petitioner contends that respondents violated his constitutional right to medical care on August 30, 2004. Although petitioner makes clear that he was housed in the Dane County jail at the time of the incident at issue, he has not indicated whether he was incarcerated as a pretrial detainee or as a prisoner. The right of pretrial detainees to medical care arises under the Fourteenth Amendment, while the right to medical care for prisoners arises under the Eighth Amendment. Nevertheless, the applicable legal tests are the same. The Court of Appeals for the Seventh Circuit has held that the Fourteenth Amendment standard of care requires essentially the same legal tests as the Eighth Amendment standard of care. Collignon v. Milwaukee County, 163 F.3d 982, 988-989(1992).

The Constitution requires the government to provide medical care for persons it incarcerates, Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)), and prohibits the government's deliberate indifference to prisoners' "serious medical needs." Estelle, 429 U.S. at 104. Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996). Unnecessary penological treatment that is so without justification that it results in needless suffering violates the Constitution. Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003) (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)). "Serious medical needs" include any conditions where the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez v. Peters, 111

F.3d 1364, 1371 (1997). A doctor's written prescription for a prescription pain killer is evidence of a serious medical need. Cooper v. Casey, 97 F.3d 914, 917 (7th Cir. 1996). If government officials withhold a prisoner's medication, resulting in gratuitous pain, the prisoner's constitutional rights may be violated. Johnson v. Doughty, 433 F.3d 1001, 1017 (7th Cir. 2006).

Here, however, petitioner cannot succeed on his claim because he has caused his own deprivation by failing to follow prison rules. In Freeman v. Berge, 441 F.3d 543 (7th Cir. 2006), prison officials withheld Freeman's meals whenever he refused to comply with Wisconsin's strict maximum-security rules guiding prisoner behavior at mealtime. Specifically, Freeman wanted to eat in his underwear. Id. at 544. Also, the prison withheld meals when Freeman wore a sock on his head at mealtime, when he was sleeping at mealtime or when he refused to clean up blood and feces he had smeared on the walls. Id. The mealtime delivery rule requires each prisoner to be standing in the middle of his cell, with the light on, wearing pants or gym shorts. Id. The court of appeals held that the prison had established "a reasonable condition to the receipt of food," using prison discipline in order to maintain an orderly environment. Id. at 545-546. Prison officials were especially concerned that a prisoner without pants could expose himself to female guards and that a prisoner wearing a sock on his head could conceal something in the sock, intending to use it as a weapon. Id. at 544. Thus, even though Freeman lost 45 pounds over 31 months

because of his lack of food, the court held that "to an overwhelming degree Freeman's food deprivation was self-inflicted, even if not 100 percent of it was, and the record contains no evidence that he experienced real suffering, extreme discomfort, or any lasting detrimental health consequences." Id. at 547. The court distinguished between food deprivation as a punishment and "food deprivation as a consequence of a refusal to comply with a condition precedent to being fed." Id. at 545.

Petitioner contends that respondents showed deliberate indifference to his medical needs by purposely withholding medication on one occasion because he refused to put on his shirt as required by jail rules. There is no indication that the denial of pain medication resulted in serious pain or discomfort or that the lack of pain medication led to an aggravation of the medical condition for which he was being treated. Nevertheless, petitioner's prescription for pain medication is evidence of his serious medical need. Cooper, 97 F.3d at 917. Therefore, the instant question is not whether petitioner had a serious medical need but rather whether petitioner's own actions caused his deprivation.

Like Freeman, petitioner chose to violate jail rules when jail officials were about to deliver a substance that most inmates would want to receive. Although Freeman interfered with the delivery of meals, and petitioner in this case interfered with the delivery of medication, the situation is analogous. In both cases, the inmate's behavior triggered the refusal to deliver. Thus, in refusing to follow an order to put on a shirt that petitioner

deemed smelly, he suffered the consequences of denial of his medication. This is not to say that an inmate's refusal to comply with rules will always bar his claim of denial of medication.

The court of appeals has indicated that if an inmate's refusal to comply with prison rules is caused by insanity or suicidal tendencies, prison officials may have a constitutional duty to intervene to insure that he receives adequate food to prevent death by starvation. Rodriguez v. Briley, 403 F.3d 952 (7th Cir. 2005). Thus, by extension, it seems logical that, should an inmate require medication such as insulin to prevent diabetic shock or nitroglycerin to halt a heart attack, the withholding of medication for the inmate's failure to comply with the rules would rise to the level of a constitutional violation. In this case, however, there is no indication or reason to believe that petitioner faced life-threatening physical effects from the withholding of his pain medication. Therefore, I conclude that petitioner has failed to state a claim against respondents for violating his constitutional rights.

ORDER

IT IS ORDERED that

1. Petitioner Clayton Mellender's request for leave to proceed in forma pauperis on his claim that respondents exhibited deliberate indifference to his serious medical needs is

DENIED.

2. Petitioner's motion for appointment of counsel is DENIED as moot.

3. The unpaid balance of petitioner's filing fee is $346.77; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will be recorded against petitioner pursuant to 28 U.S.C. §1915(g); and

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

Entered this 13th day of July, 2006.

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