IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RUSSEL L. SINGLETARY,

Petitioner,

OPINION AND ORDER

v.

06-C-323-C

JAMES W. REED, M.D.
CHIEF MEDICAL DIRECTOR
FCI OXFORD
OXFORD, WISCONSIN,

Respondent.

- -

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1331. Petitioner, who is presently confined at the Federal Correctional Institution in Oxford, 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. 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 respondent violated his rights under the Eighth Amendment by deliberately failing to provide him medication after he had surgery. Petitioner will be granted leave to proceed in forma pauperis on his claim.

In his complaint and attachments, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Russel L. Singletary is a federal inmate housed at the Federal Correctional Institution in Oxford, Wisconsin. Respondent James W. Reed is the chief medical director at the Oxford facility.

A. Medical Care

On March 17, 2004, a Dr. Aslam examined petitioner because petitioner was

bleeding. Dr. Aslam referred petitioner to a colon surgeon. After petitioner experienced bleeding and extreme pain for several months, the surgeon examined him and scheduled surgery to remove a colon polyp. Petitioner was placed in isolation from June 8 through 15, 2004. On June 15 petitioner was transported to Oshkosh to undergo surgery and returned to Oxford later that same day.

When he returned to the Oxford facility after surgery petitioner was given Tylenol to help manage his pain. The "Oxford medical staff" discarded all other medication petitioner had been prescribed, including fiber tablets and hydrocortisone. Respondent refused petitioner medication to prevent infection as well as medication for high blood pressure. Petitioner was told to purchase medication from the commissary, but no antibodies (petitioner may have meant "antibiotics") or hydrocortisone (which petitioner believed he needed to help control bleeding and relieve pain) are sold there.

On July 26, 2004, petitioner was given pain medication. On August 15, 2004, respondent issued petitioner a prescription for high blood pressure medication. Petitioner had developed an infection several weeks before being issued medication for pain and high blood pressure. Respondent Reed did not prescribe medication to address the infection or problems related to the surgery.

On October 4, 2004, a Dr. Hickman began to address petitioner's condition. On January 18, 2005, Hickman examined petitioner and found a serious infection that had

developed into an erupted cyst with two openings around petitioner's anus. Hickman provided emergency treatment and placed petitioner on "convalescent status." He also referred petitioner back to the surgeon to remove the cyst and repair the two openings. The surgeon examined petitioner on March 2, 2005, provided emergency treatment and scheduled another surgery, which took place on August 9, 2005.

B. Administrative Complaint

On August 31, 2005, petitioner filed a request for administrative remedy, alleging that he had received improper medical care at the Oxford facility. On September 30, 2005, he received a response from the warden stating, "You have been provided appropriate and necessary medical care by professional staff." Petitioner appealed the warden's decision to the Bureau of Prisons's regional office (a BP-10 appeal). On November 18, 2005, petitioner's BP-10 appeal was denied. Petitioner did not receive the denial until December 16, 2005 (he believes the correspondence had been held in the warden's office until then). The deadline to appeal the BP-10 denial (by filing a BP-11 appeal with the Bureau of Prison's central office) was two days later, on December 18. On December 16, petitioner mailed a BP-11 appeal to the Bureau of Prisons' central office. Presumably because he had not received a response to his appeal, in January 2006 petitioner spoke with Vickie Bortz from the Bureau of Prisons' legal office. Bortz stated that petitioner's December 16 BP-11

appeal may have been lost in the mail (implying that the Bureau of Prisons did not receive it) and suggested that petitioner request permission to file an untimely appeal.

On February 23, 2006, petitioner sent a letter to the Bureau of Prisons' Office of the General Counsel, requesting permission to file a late BP-11 appeal. In the letter, petitioner stated that he had mailed a BP-11 appeal to the Bureau of Prisons on December 16, 2005. He stated also that because he did not receive the BP-10 denial until two days prior to the appeal deadline, he did not have adequate time to appeal. (What petitioner may have been attempting to say with these seemingly contradictory statements is that even though he mailed a BP-11 appeal on December 16, as soon as he learned of the BP-10 denial, it would not have arrived at the Bureau of Prisons prior to the December 18 deadline). Also on February 23, 2006, petitioner sent a new BP-11 appeal to the Bureau of Prisons' central office, in the event his earlier appeal had been lost.

On March 9, 2006, the central office denied petitioner's February 23 appeal as untimely and informed petitioner that he "will need staff verification on BOP letterhead to document that your untimeliness was not your fault." Petitioner's case manager at the Oxford facility sent a letter to the Office of General Counsel on March 22, 2006, explaining that petitioner did not receive a copy of the November 18, 2005, BP-10 denial until December 16, 2005. She stated that "This delay is no fault of his." On April 3, 2006, the central office issued a rejection notice, stating: "Staff memo states you received your BP10

response on 12-16-05. Your appeal wasn't received in this office until 03-06-06. Your appeal is confirmed as untimely."

DISCUSSION

A. Eighth Amendment

Deliberate indifference to prisoners' serious medical needs is forbidden by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). To state an Eighth Amendment 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 respondent Reed was 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 after his surgery in June 2004 he experienced pain, bleeding and developed an infection. These allegations of pain and suffering are sufficient to suggest a serious medical 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 allege deliberate indifference, petitioner's allegations must suggest that respondent Reed 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).

Although petitioner does not allege clearly precisely who denied him medications and when, I understand petitioner to be alleging that respondent Reed knew about petitioner's pain and infection after the June 2004 surgery but failed to prescribe him medication. This is sufficient as an allegation of deliberate indifference. Therefore, I will allow petitioner to proceed on this claim. (It is unclear whether it is petitioner's intent to sue respondent Reed for the alleged misdeeds of other staff members. If he is, he will be unable to succeed ultimately unless he can prove that respondent Reed knew what other staff members were doing or that he directed their actions. Otherwise, respondent Reed cannot be held liable

for the actions of other staff members solely because he is the medical director.)

B. Restraining Order

Along with his complaint, petitioner has filed a motion requesting a restraining order forbidding the warden at the Oxford facility from destroying "recordings from surveillance camera records #117" from December 16, 2005. In his motion, petitioner states that surveillance camera #117 records all legal mail as it is deposited into the legal mailbox. According to petitioner, he deposited legal mail into the mailbox at approximately 8:35 p.m. on December 16, 2005 (I presume he is referring to his first BP-11 appeal). Petitioner alleges that this piece of mail was removed from the mailbox and was never mailed out of the institution.

Petitioner has not made the showings required for this court to issue a restraining order and therefore his motion will be denied. In order to obtain emergency injunctive relief, petitioner must submit evidence showing that (1) he has no adequate remedy at law and will suffer irreparable harm if the relief is not granted; (2) the irreparable harm he would suffer outweighs the irreparable harm respondents would suffer from an injunction; (3) he has some likelihood of success on the merits; and (4) the injunction would not frustrate the public interest. Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985). Petitioner's motion fails at the outset because he has not shown that he will "suffer irreparable harm if

the relief is not granted." I understand from petitioner's motion for a restraining order that he is anticipating that respondent will move to dismiss this lawsuit on the ground that he failed to exhaust his administrative remedies because he did not file a timely BP-11 appeal. Even if respondent raises this argument and the resolution of the exhaustion question ultimately turns on whether petitioner mailed a BP-11 appeal on December 16, 2005, petitioner's position will not be not be strengthened by the videotape at issue. Even if the videotape showed petitioner depositing this particular piece of mail in the mailbox, petitioner would not need to introduce the videotape as evidence. If this issue arises later in the case, petitioner will have an opportunity to submit an affidavit declaring to be true under penalty of perjury that he mailed a BP-11 appeal on December 16, 2005. Such an affidavit, together with the copy of the December 16 appeal he already has submitted, will carry as much evidentiary weight as a videotape showing him dropping the letter in the mailbox. Accordingly, petitioner's motion for a restraining order will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Russel Singletary is GRANTED leave to proceed on his claim that respondent Reed violated his Eighth Amendment rights by failing to prescribe him medication.

2. Petitioner's motion for a restraining order forbidding the destruction of a surveillance videotape is DENIED.

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 $334.34; petitioner is obligated to pay this amount as described in 28 U.S.C. § 1915(b)(2).

6. A completed Marshals service and summons form will be forwarded with a copy of petitioner's complaint to the United States Marshal for service on the respondent.

Entered this 7th day of July, 2006.

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