

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

DWAYNE ALMOND,

Petitioner,

ORDER

v.

06-C-446-C

STATE OF WISCONSIN; GREGORY GRAMS;
MR. GREEN BAY WARDEN; LT. LESATZ;
LT. DWIEKATOWSKI; R.N. MS. JEAN LUTSEY;
and MS. JEANANNE GREENWOOD,

Respondents.

This is a proposed civil action for monetary relief under 42 U.S.C. § 1983. Petitioner Dwayne Almond, an inmate at the Wisconsin Resource Center in Winnebago, Wisconsin, contends that respondents violated his constitutional rights under the Eighth Amendment of the United States Constitution when they refused to provide him with emergency medical treatment for a back injury he sustained on April 1, 2006.

In an order dated August 18, 2006, I concluded that petitioner does not have the means to make an initial partial payment of the filing fee and that his request for leave to proceed in forma pauperis in this case and in five related cases would be taken under

advisement. In this order, I will consider whether some or all of petitioner's complaint in this case should be dismissed on the ground that the action is legally meritless, fails to state a claim on which relief may be granted or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

Because petitioner has alleged facts from which it may be inferred that respondent LeSatz exhibited deliberate indifference to petitioner's serious medical needs by refusing to provide him with emergency medical treatment on April 1, 2006, his request for leave to proceed against respondent LeSatz will be granted. However, because petitioner has not indicated that the remaining respondents he has named were involved in any way in denying him medical care, respondents Gregory Grams, Mr. Green Bay Warden, Jean Lutskey, Jeananne Greenwood and Lieutenant Dwiekatowski will be dismissed from this lawsuit.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Dwayne Almond is a prisoner at the Wisconsin Resource Center in Winnebago, Wisconsin.

Respondent Gregory Grams is Warden of the Columbia Correctional Institution.

Mr. Green Bay Warden is Warden of the Green Bay Correctional Institution in Green

Bay, Wisconsin.

Respondent Lieutenant LeSatz is a correctional officer at the Green Bay Correctional Institution.

Respondent Jean Lutskey is a nurse.

Respondent Jeananne Greenwood is manager of the health service unit at the Green Bay Correctional Institution.

(Lieutenant Dwiekatowski is not identified.)

B. Back Injury

On Saturday April 1, 2006, petitioner was incarcerated in the segregation unit at the Green Bay Correctional Institution in Green Bay, Wisconsin. Respondent LeSatz was working on the unit. He noticed that petitioner had fallen on the floor and was unable to stand because his back had “gone out.” Nevertheless, respondent LaSatz did nothing to help petitioner. Petitioner remained on the floor for two days without medical attention. During that time, he was unable to get to the toilet and consequently was forced to lie in his own excrement. Respondent LeSatz told petitioner he could not take him to the emergency room because of staff shortages, but that “on Monday” he would take petitioner to the prison health services unit.

At some later time, petitioner filed an inmate complaint about the denial of medical

care he experienced. Respondent Greenwood told the inmate complaint examiner investigating petitioner's complaint that the institution has a nurse and the Department of Corrections has a doctor who is on call 24 hours a day, 7 days a week. Respondent Greenwood reported that when an inmate requires emergency medical care, the institution may transport prisoners to the local hospital emergency room.

OPINION

A. Deliberate Indifference

“[T]he Eighth Amendment requires the government ‘to provide medical care for those whom it is punishing by incarceration.’” Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). In order to succeed on a claim of deliberate indifference, a plaintiff must establish facts from which it can be inferred that he had a serious medical need and that prison officials were deliberately indifferent to that need. Id. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). The Court of Appeals for the Seventh Circuit has held that “serious medical needs” are not only conditions that are life threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371.

Petitioner contends that respondent LeSatz exhibited deliberate indifference to his

need for emergency medical treatment when he refused to transport petitioner to the local hospital (or even to consult a medical professional by phone) when petitioner collapsed onto his cell floor after injuring his back on April 1, 2006. Although the “serious medical need” formulation is far from self-defining, it is clear that the Supreme Court contemplated that medical conditions far less critical than “life-threatening” would be encompassed by the term. *Id.* at 1370. In fact, the inmate in Estelle, 429 U.S. at 107, based his medical care claim “solely on the lack of diagnosis and inadequate treatment of his back injury,” which had been diagnosed by prison doctors as a lower back strain and was treated with muscle relaxants and pain medication. Gutierrez, 111 F.3d at 1370-71. It is equally well-established that a prison official may display deliberate indifference by failing to treat or delaying the treatment of a serious medical need. Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996). Therefore, although it remains to be seen whether petitioner will be able to prove that his back injury was a serious medical need or that respondent LeSatz knew that delaying treatment for petitioner’s alleged injury would cause him more than minimal harm or discomfort, at this stage of the proceedings petitioner has alleged enough to state a claim under the pleading requirements of Fed. R. Civ. P. 8. Consequently, petitioner will be granted leave to proceed on his claim that respondent LeSatz violated his Eighth Amendment rights by refusing to provide him with access to medical care on April 1, 2006.

B. Proper Respondents

However, although petitioner has stated a claim against respondent LeSatz, he has not stated a claim against any of the remaining respondents. The state of Wisconsin is not a proper respondent because it is not a “person” that may be sued for money damages under § 1983. Williams v. Wisconsin, 336 F.3d 576, 580 (7th Cir. 2003). Petitioner has not alleged any wrongdoing by respondents Jean Lutskey and Lieutenant Dwiekatowski, or even made mention of them outside the caption of his complaint.

Although petitioner has identified respondent Greenwood as director of the prison health services unit, he has not indicated that she played any role in denying him medical care on the weekend of April 1 and 2, 2006. Similarly, petitioner does not allege that respondent Mr. Green Bay Warden implemented any policy that caused petitioner to be denied health care or that the respondent warden personally participated in the decision to deny petitioner medical care. Liability under § 1983 must be premised on an official’s personal involvement in a constitutional deprivation, Davis v. Zirkelbach, 149 F.3d 614, 619 (7th Cir. 1998); the statute may not be used to hold supervisory officials liable for the acts of their subordinates, Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1355 (7th Cir. 1985). Therefore, neither respondent Greenwood nor respondent Mr. Green Bay Warden is a proper defendant to this lawsuit.

Finally, because petitioner was incarcerated at the Green Bay Correctional Institution

at the time he injured himself, respondent Grams (who is the warden of the Columbia Correctional Institution) is not a proper defendant to this action and will be dismissed.

C. Appointment of Counsel

28 U.S.C. § 1915(e)(1) authorizes a court to appoint counsel for indigent litigants in civil cases. Because there are no funds available to reimburse counsel appointed under this section for their costs of representing the party, such appointments are made only when “exceptional circumstances” justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993) (quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). The Court of Appeals for the Seventh Circuit will find such an appointment reasonable where the party’s likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other words, the test is whether, given the difficulty of the case, the party requesting counsel appears to be competent to represent himself and, if not, whether the presence of counsel would make a difference in the outcome of the case. Id.

From documents petitioner has submitted with this case and from documents filed with petitioner’s complaints in Case Nos. 06-C-447-C, 06-C-448-C, 06-C-449-C, 06-C-450-C and 06-C-451-C, I am aware that petitioner is mentally retarded and suffers from paranoid schizophrenia and psychosis. Petitioner’s complaint was difficult to follow, and I have no

doubt that his mental limitations would restrict his ability to litigate this lawsuit. In short, I have become convinced that if this case proceeds beyond the pleading stage, petitioner will not be able to represent himself without the assistance of a lawyer.

A prisoners who files a civil lawsuit under § 1983 is required to exhaust his administrative remedies before bringing suit. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999) (exhaustion a precondition to suit). If the prisoner does not do so, a defendant may move to dismiss the case under 42 U.S.C. § 1997e(a). From petitioner's complaint and the documents that accompany it, I am unable to tell whether he has exhausted his administrative remedies. Because it would be premature to appoint counsel before it is clear that this case will proceed, I will not appoint counsel until it is clear that the case will not be dismissed on that ground. However, the parties should be aware that I intend to stay all further proceedings in this case and make efforts to appoint counsel if (1) respondent LeSatz does not file a motion to dismiss under § 1997e(a) in response to petitioner's complaint before filing an answer or (2) respondent files such a motion and it is denied.

ORDER

IT IS ORDERED that

1. Petitioner's request to proceed in forma pauperis is

a) GRANTED with respect to petitioner's claim that respondent LeSatz exhibited deliberate indifference to his serious medical needs by refusing to provide him with emergency medical treatment for his back injury on the weekend of April 1, 2006; and

b) DENIED with respect to petitioner's claim against all other respondents.

2. Respondents Gregory Grams, Mr. Green Bay Warden, Jean Lutskey, Jeananne Greenwood and Lieutenant Dwiekatowski are DISMISSED from this lawsuit.

3. Until such time as counsel may be appointed for petitioner, he 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. The unpaid balance of petitioner's filing fee is \$350.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2) when he has the means to do so.

5. 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.

6. 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 respondent.

Entered this 23d day of August, 2006.

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