

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

DWAYNE ALMOND,

Petitioner,

v.

ORDER

06-C-451-C

STATE OF WISCONSIN; DEPARTMENT OF
CORRECTIONS; MATHEW FRANK, Secretary;
COLUMBIA CORRECTIONAL INSTITUTION EMPLOYEES;
GREGORY GRAMS, Warden; JANEL NICKEL, Secretary;
SEAN SALTER, Unit Clerk; MIKE VANDERBROOK, Clinical Services;
JANET WALSH, Clinical Service; ? NETSON, Clinical Services;
? SCHWEBKE; and ? CALLISTER, Clinical Services,

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 by refusing to provide him with mental health care for his mental illnesses.

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 other 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).

From petitioner's complaint and the documents attached to it, I draw the following allegations of fact.

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 in Portage, Wisconsin.

Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Respondent Janet Walsh is supervisor of the clinical services unit at the Columbia Correctional Institution.

Respondents Schwebke, Callister and Netson are mental health professionals employed by the Wisconsin Department of Corrections.

(Petitioner does not identify respondents Janel Nickel, Captain Sean Salter or Mike Vanderbrook.)

B. Mental Health Needs

At various times, petitioner has been diagnosed with mild mental retardation, chronic paranoid schizophrenia, psychosis and antisocial personality disorder. Petitioner has been incarcerated on at least four occasions and has been seen by numerous correctional psychologists and psychiatrists while confined. He has been placed on trials of a number of psychiatric medications, though he has taken none consistently.

At some point during petitioner's most recent incarceration, he was placed on the mental health intake unit at the Dodge Correctional Institution. The staff members there said petitioner needed "special help."

Later, petitioner was transferred to the Columbia Correctional Institution. At some time, petitioner filed inmate complaint number CCI-2006-3654, in which he alleged that respondent Walsh was denying him mental health treatment. Petitioner wrote to respondent Grams more than 20 times requesting help, but received no response.

OPINION

A. Deliberate Indifference

A state actor violates an inmate's rights under the Eighth Amendment when he or she exhibits deliberate indifference to the inmate's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Mental illness may constitute such a need if failure to treat the condition poses a threat to an inmate's health or safety. Sanville v. McCaughtry, 266 F.3d 724, 734 (7th Cir. 2001). In this case, petitioner alleges that respondent Walsh denied him treatment for his schizophrenia and psychosis on or about February 2, 2006, and that respondent Grams failed to assist petitioner in obtaining appropriate treatment although petitioner asked Grams for help on many occasions.

The Court of Appeals for the Seventh Circuit has held repeatedly that pro se litigants (and, indeed, all litigants) must not be held to heightened pleading standards. Under Federal Rule of Civil Procedure 8(a)(2), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Lekas v. Briley, 405 F.3d 602, 606 (7th Cir. 2005). This "short and plain statement," with irrelevant exceptions, requires the petitioner to plead merely "the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer," Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002), and not an exhaustive recitation of the facts or elements of that claim, Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002). A complaint should be dismissed for failure to state a claim only if no relief could be granted under any set of facts that could be proven consistent with the allegations. DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir.

2000) .

“In order to state a claim under Section 1983, a plaintiff must allege that the defendants deprived him of a right secured by the Constitution or laws of the United States, and that the defendants acted under color of state law.” Lekas, 405 F.3d at 606; Brokaw v. Mercer County, 235 F.3d 1000, 1009 (7th Cir. 2000). Although much is missing from petitioner’s complaint that would assist the court and the parties in understanding and better assessing the merits of petitioner’s claim, petitioner has alleged enough to satisfy Rule 8 with respect to his claim that respondents Walsh and Grams, both state prison officials, violated his Eighth Amendment right to obtain medical care for his serious mental illness.

However, petitioner should be aware that prison officials do not violate the Eighth Amendment when they fail to notice an inmate’s serious medical need or mistake it for a less serious condition. Sanville, 266 F.3d at 735. Similarly, they do not violate the Eighth Amendment when they provide a prisoner with medical care that is less than optimal, or even with care that is negligent. Estelle, 429 U.S. at 106 (“[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”). Petitioner has attached to his complaint records of his visits with numerous correctional psychiatrists and psychologists. I cannot accept these records for the truth of the matter contained within

them; however, I note that if these records are an accurate reflection of petitioner's access to mental health treatment, it is highly unlikely that he will be able to prevail on his deliberate indifference claim.

Although petitioner will be granted leave to proceed on his claim against respondents Walsh and Grams, he will be denied leave to proceed against State of Wisconsin, Matthew Frank, unidentified Columbia Correctional Institution Employees, Janel Nickel, Sean Salter, Mike Vanderbrook, Netson, Schwebke and Callister. The state of Wisconsin is not a proper respondent because it is not a "person" that may be sued for money damages under § 1983, and therefore must be dismissed. Williams v. Wisconsin, 336 F.3d 576, 580 (7th Cir. 2003). And although petitioner was not required to plead much in his complaint, he was required to provide "the bare minimum facts necessary to put the defendant[s] on notice of the claim" against them. Higgs, 286 F.3d at 439; Beanstalk Group, Inc. v. AM General Corp., 283 F.3d 856, 863 (7th Cir. 2002). Because petitioner has not alleged any wrongdoing by respondents Frank, Nickel, Salter, Vanderbrook, Netson, Schwebke, Callister and unidentified Columbia Correctional Institution Employees, or even made mention of them outside the caption of his complaint, these respondents will be dismissed as well.

B. 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-446-C, 06-C-447-C, 06-C-448-C, 06-C-449-C and 06-C-450-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 prisoner 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 beyond the pleading stage, I will not appoint counsel until it is clear that the case will not be dismissed on the ground that petitioner failed to exhaust his administrative remedies. 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) respondents Walsh and Gram do not file a motion to dismiss under § 1997e(a) in response to petitioner's complaint before filing an answer or (2) respondents file 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 respondents Walsh and Grams exhibited deliberate indifference to his serious medical needs by refusing to provide him with access to mental health care and

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

2. Respondents State of Wisconsin, Matthew Frank, unidentified Columbia Correctional Institution Employees, Janel Nickel, Sean Salter, Mike Vanderbrook, Netson, Schwebke and Callister are DISMISSED from this lawsuit.

3. Until such time as counsel may be appointed for petitioner, he 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 respondents or to respondents' 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 respondents.

Entered this 23d day of August, 2006.

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