IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

KENNETH HARRIS,

Petitioner, OPINION and ORDER

v. 3:07-cv-678-bbc

GREGORY GRAMS, SGT. LINDA HINICKLE and COII RYAN (Female, First Name Unknown ("FNU")),

Respondents.

- -

This is a proposed civil action brought under 42 U.S.C. § 1983. Petitioner Kenneth Harris, a prisoner who is housed at the Columbia Correctional Institution in Portage, Wisconsin, requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. In his complaint, petitioner contends that respondents Sgt. Linda Hinickle and COII Ryan violated his Eighth Amendment rights when they refused to provide him with adequate medical care on April 17, 2005. In addition, he contends that they did so in retaliation for his helping another inmate prepare a grievance form and lawsuit and that such retaliation is a violation of his First Amendment rights. Finally, petitioner contends that on another occasion his First Amendment rights were violated by respondent Gregory Grams when

respondent Grams retaliated against petitioner for filing a John Doe proceeding regarding prison officials' failure to provide him with adequate medical care.

Petitioner has made his initial partial payment in accordance with 28 U.S.C. § 1915. However, because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail 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. 28 U.S.C. §§ 1915 and 1915A.

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). In his complaint, petitioner alleges the following facts.[1]

[1] In addition to his 16-page complaint, petitioner submitted to the court nearly 100 pages of supporting documents. Most of the documents appear to be unauthenticated medical records regarding petitioner's medical condition. Because the documents appear to be originals and this is not the stage in the lawsuit at which petitioner is required to submit evidence in support of his claims, the original documents will be returned to petitioner and a copy will be retained in the court's files. Finally, I will caution petitioner that unauthenticated medical records are not admissible evidence under the federal rules; he will need to obtain authenticated, admissible evidence to support his claims as this lawsuit progresses.

ALLEGATIONS OF FACT

Petitioner Kenneth Harris is a prisoner who is presently incarcerated at the Columbia Correctional Institution in Portage, Wisconsin. Respondents Gregory Grams, Linda Hinickle and COII Ryan work at the Columbia Correctional Institution. Respondent Grams is the warden; respondents Hinickle and Ryan are correctional officers.

When petitioner was transferred to the Columbia Correctional Institution, he had two lawsuits pending, one in Dane County circuit court (State of Wisconsin ex rel. Harris v. Borgen, no. 03-CV-3836) and one in the United States District Court for the Eastern District of Wisconsin (Harris v. Smith, no. 02-C-0321). Prison officials were aware of these cases and harassed petitioner because of them. In late 2004 or early 2005, when petitioner was teaching another prisoner how to complete prison grievance forms and file a complaint under 42 U.S.C. § 1983, respondent Ryan screamed at him, "Harris, shut your mouth, I don't want to hear any of your legal mumbo-jumbo."

Beginning on March 27, 2005, petitioner began experiencing severe abdominal pain. By April 7, 2005, petitioner's pain was so severe that he had trouble walking and sleeping and was unable to eat without vomiting. He was first examined by health services staff on April 7. On April 15, petitioner was still experiencing severe abdominal pain. In addition, he began "gushing large amounts of blood from his rectum." As a result, petitioner was taken to the health services unit and sent immediately to an emergency room at a local

hospital. The doctor at the hospital was not able to identify why petitioner was experiencing severe abdominal pain, but prescribed a pain medication, "Toradol" (also called "Keterolac"), to be taken every six hours, as needed. Toradol does not come in pill form. Therefore, it had to be injected by health services staff. When petitioner returned to the Columbia Correctional Institution, the prison doctor prescribed two additional pain medications, Tylenol 3 and a G.I. cocktail, for petitioner. Both were to be taken every six hours as needed.

On April 16, petitioner received injections of Toradol at 8 a.m. and 5 p.m. The doctor told petitioner that he should go to recreation and walk because the doctor thought he was constipated.

On April 17, petitioner received an injection of Toradol at 1 a.m. and a dose of Tylenol 3 at 3 a.m. During the shift change, the correctional officer who had been on the third shift told respondents Ryan and Hinickle several things about petitioner's condition. He told them (1) that petitioner was experiencing severe abdominal pain and rectal bleeding; (2) when petitioner had last received his medications; (3) where petitioner's Tylenol 3 was in the unit medicine box; and (4) that if petitioner reported pain or bleeding, he should be sent immediately to the health services unit for an injection of Toradol.

Petitioner was unable to eat breakfast that morning because his abdominal pain was so severe. Sometime between 6:40 and 6:50 a.m., petitioner approached respondent Ryan

to ask to be signed up to go to recreation and to the law library. As he walked back to his cell, petitioner's pain became so severe that it hurt to walk. He returned to tell respondent Ryan this, and asked her to call the health services unit so he could get his injection of Toradol. She refused, telling him in an angry voice that she would "not call[] anyone!" Petitioner asked her five or six more times to call someone to arrange for his injection, but she repeated that she would not call "anyone" and told him that he could take a pill from the "med box." When petitioner told her that he was unable to take the Tylenol 3 again until 9 a.m. and that he needed to be sent to the health services unit for an injection of Toradol at 7 a.m., she said "I'm not calling anyone, either you take these pills or you get nothing!" She repeated this after petitioner "pleaded" with her to call the health services unit to arrange for his injection.

Finally, respondent Ryan picked up the phone and called respondent Hinickle. Petitioner could not hear what she was saying, so he asked her when she was off the phone whether she had been calling the health services unit and whether medical help was coming. Respondent Ryan said, "No, I told you I'm not calling anyone." Petitioner was in agonizing pain and said, "Please call the HSU, I'm hurting real bad and need the injection of pain medication!" Respondent Ryan told petitioner that he could "go see what Sgt. Hinickle has to say."

Respondent Hinickle was in a glass-enclosed officer's station approximately 50 feet

from where petitioner and respondent Ryan were standing. Petitioner walked over to respondent Hinickle, but before he got there, Hinickle began pounding on the glass door and told him to get away from the door, because she did not "want to hear about it." Petitioner told her twice more that he was in severe pain, needed to be sent to the health services unit for pain medication and that this information was in the log book. Respondent Hinickle repeated that he was to get away from the door and that she did not "want to hear about it." She told him to return to his cell immediately.

When petitioner repeated his request to both respondents Ryan and Hinickle they screamed at him that they would not call anyone and ordered him to return to his cell and "lock-in." When petitioner told respondent Ryan that he thought they were engaging in prisoner abuse, she shouted, "Blow it out of your ass!" and directed him to return to his cell immediately. Petitioner did not return to his cell. Instead, he told respondents that he would file a grievance against them and sat down at a table in a common area. In doing so, petitioner hoped that respondents would call a supervisor to help remove petitioner from the table and that the supervisor would agree to send him to the health services unit.

Respondent Ryan told respondent Hinickle to push a button to call for assistance. When the response team arrived, one of the members said "Don't touch him, I know what's going on here, this man is really sick. I've been taking him to the HSU for awhile and at all hours of the day, and I just sat at the hospital emergency room with him two nights ago."

Another team member said, "This was unnecessary." Petitioner explained the circumstances to the response team captain and one of the response team members used a wheelchair to take petitioner to the health services unit for his pain medication. Petitioner was sent back to the local hospital's emergency room, where he received a Toradol injection.

When they heard that petitioner was on his way to the hospital, respondents Ryan and Hinickle provided false information to the nurse preparing petitioner's medical record. Respondent Ryan filed a conduct report, No. 1515025, regarding petitioner's behavior; respondent Hinickle filed incident report No. 732370. As a result of these reports, petitioner was placed in temporary lock-up when he returned from the hospital.

A disciplinary committee found petitioner guilty with respect to the conduct report. Petitioner appealed this decision to respondent Grams. Petitioner had told respondent Grams what had happened, and respondent Grams had the authority to reverse the finding, but he did not. Respondent Grams later altered defendant Ryan's conduct report in response to a sheriff's investigation.

On April 24, 2005, while petitioner was housed in temporary lock-up, he filed a petition for a John Doe proceeding under Wis. Stat. § 968.26. Petitioner alleged that he was the victim of crimes committed by respondents Hinickle and Ryan. Petitioner continued to experience severe abdominal pain and bleeding.

On June 7, 2005, the Columbia County circuit court judge to whom petitioner's John

Doe complaint had been assigned ordered the sheriff's department to visit the Columbia Correctional Institution to investigate petitioner's allegations.

On or about August 22, 2005, respondent Grams had petitioner placed in temporary lock-up, alleging that petitioner had solicited staff. This allegation was false and never proven. Respondent Grams made the allegations in an effort to chill petitioner's involvement with the John Doe proceeding.

On or about September 2, 2005, respondent Grams took further action against petitioner for his participation in the John Doe investigation. Respondent Grams placed petitioner and Nurse Sue Ward under investigation for "fraternization." On September 14, 2005, Nurse Ward testified at a hearing regarding the John Doe proceeding that respondent Hinickle told her on April 17, 2005 that "this morning inmate Harris was begging us to call HSU for medical help for him, but we told him to blow it out of his ass!"

DISCUSSION

A. Denial of Medical Care

The Eighth Amendment to the United States Constitution 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)). To prevail ultimately on a claim under the Eighth Amendment, a prisoner must

prove that prison officials engaged in "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106.

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584 -85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or it otherwise subjects the detainee to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). A delay in treatment can constitute harm under the Eighth Amendment if it causes "needless suffering." Williams v. Liefer, 491 F.3d 710, 715 (7th Cir. 2007) (quoting Gil v. Reed, 381 F.3d 649, 662 (7th Cir. 2004)). "Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, petitioner's claim is analyzed in three parts:

(1) Whether petitioner had a serious health care need;

(2) Whether respondents knew that petitioner needed care; and

(3) Whether, despite their awareness of the need, whether respondents failed to take reasonable measures to provide the necessary care.

Petitioner does not have to allege the facts necessary to establish each of these

elements at the pleading stage, but they provide the framework for determining whether petitioner has alleged enough to give respondents notice of his claims. Kolupa v. Roselle Park District, 438 F.3d 713, 715 (7th Cir. 2006); Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005).

There is little question that it is possible at this early stage of the case to infer that petitioner had a serious medical need. He was experiencing severe pain and abdominal bleeding, for which he was taking several prescription drugs multiple times daily. Petitioner had been taken to the emergency room for treatment prior to the incident in question and was taken to the emergency room again afterwards. He alleges that the delay in treatment caused him to experience severe pain for an undisclosed amount of time.

Next, I must consider whether petitioner's allegations suggest that respondents Ryan and Hinickle were deliberately indifferent to his need for medical care. Petitioner alleges that respondents were aware that he was in pain and needed immediate care not only because he told them so, but also because this information was conveyed to them in the log book and by the correctional officer who was leaving his shift as they began theirs. In spite of this, they refused to call the health services unit to arrange for petitioner to receive his scheduled shot of Toradol. Instead, they yelled at him that they would not call "anyone" and ordered him back to his cell. When petitioner demanded that respondent Ryan call the health services unit, she told him to "blow it out [his] ass." Petitioner received medical care

only after other prison officials were called to remove him from the table where he sat. Under these circumstances, respondents' actions could constitute deliberate indifference; therefore, petitioner will be granted leave to proceed on his Eighth Amendment claims against respondents Ryan and Hinickle.

B. Retaliation

Petitioner raises two retaliation claims. He alleges that respondents Ryan and Hinickle refused to provide him with medical care because of his involvement with two lawsuits and that they did so also because he had been helping another prisoner prepare a grievance form and complaint under 42 U.S.C. § 1983. In addition, petitioner alleges that because he filed and pursued a John Doe proceeding against respondents Ryan and Hinickle, respondent Grams falsely accused him of soliciting staff, placed him in temporary lock-up and later commenced an investigation into petitioner's "fraternization" with a prison nurse.

To state a retaliation claim, a prisoner must provide information in his complaint from which it may be inferred that he engaged in constitutionally protected conduct and that his protected actions prompted one or more prison officials to take adverse action against him. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. 2003). An inmate is not required to allege a chronology of events from which retaliation may be inferred but must allege the

retaliatory act and describe the protected act that prompted the retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). These minimal facts are necessary to give prison officials adequate notice of the claim against them. Beanstalk Group, Inc. v. AM General Corp., 283 F.3d 856, 863 (7th Cir. 2002).

1. Retaliation by respondents Ryan and Hinickle

Petitioner contends that respondents Ryan and Hinickle denied him medical assistance because petitioner was involved with two lawsuits when he was transferred to the Columbia Correctional Institution and because he helped another inmate prepare a grievance form and taught him how to prepare a complaint under 42 U.S.C. § 1983.

It is well settled that prisoners have a right of access to the courts, Lewis v. Casey, 518 U.S. 343, 351 (1996). When prison officials take action against prisoners for filing lawsuits and grievances, they violate the First Amendment, even if their actions do not independently violate the Constitution. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000); Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons.").

Petitioner has alleged that respondents Ryan and Hinickle refused to call for medical

care *because* he was involved with two lawsuits, which he identifies. This is sufficient for petitioner to proceed with his claim at this early stage. However, a word of warning is in order. Petitioner alleges that "prison officials" were aware that he had filed two lawsuits when he arrived at the Columbia Correctional Institution. He does not say that respondents Ryan and Hinickle were aware of these lawsuits. To prevail ultimately on this retaliation claim, petitioner will need to show that respondents knew that he was engaging in protected conduct. Salas v. Wisconsin Department of Corrections, 493 F.3d 913, 925 (7th Cir. 2007).

Next, prisoners have no "special" right to act as jailhouse lawyers. Shaw v. Murphy, 532 U.S. 223, 230-32 (2001). However, they do retain a general First Amendment right to communicate with other prisoners, albeit in limited form. Turner v. Safley, 482 U.S. 78, 89 (1987) (restrictions on communications between prisoners pass constitutional muster if they are "reasonably related" to legitimate and neutral penological objectives). In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Id. at 89.

At this early stage, I will not speculate about whether prison officials might have had a legitimate and objective reason for restricting petitioner's ability to assist another prisoner with legal materials. Instead, I will presume that petitioner had a constitutionally protected right to engage in this communication under the First Amendment. Therefore, respondents Ryan's and Hinickle's retaliation against petitioner for assisting another prisoner with legal materials may have been impermissible

3. Retaliation by respondent Grams

Next, petitioner contends that respondent Grams retaliated against him for pursuing the John Doe proceeding against respondents Ryan and Hinickle by instigating an investigation of petitioner and having him placed in temporary lock-up for "soliciting staff" and by placing petitioner under investigation for "fraternization" with a prison nurse. As noted above, prisoners have the right of access to the courts, and his request for and pursuit of a John Doe proceeding in state circuit court would be a protected activity under the First Amendment. If petitioner's initiation and pursuit of the John Doe proceeding were reasons for respondent Grams's commencement of investigations of petitioner and placing him in temporary lock-up, this could constitute prohibited retaliation. Therefore, petitioner will be granted leave to proceed on his claim against respondent Grams as well.

ORDER

IT IS ORDERED that

1. Petitioner Kenneth Harris is GRANTED leave to proceed in forma pauperis on his claims under the Eighth Amendment against respondents Sgt. Linda Hinickle and COII Ryan. In addition, petitioner is GRANTED leave to proceed on his First Amendment retaliation claims against respondents Hinickle, Ryan and Gregory Grams.

2. 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 the state respondents.

3. For the remainder of this lawsuit, petitioner 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. 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 $319.90; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

6. Petitioner submitted a large number of documents with his complaint, consisting mostly of documentation of his medical condition. Those papers are not considered to be a part of petitioner's complaint. Because many of them appear to be original documents, I have made a copy of them for the court's file and am returning the originals to petitioner.

Entered this 11th day of January, 2008.

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