

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

PETER J. LONG,

Petitioner,

v.

JANE DOE, SCI 1st Shift Nurse,
OFFICER STEGER, SCI Unit #1C
1st Shift C.O., SERGEANT CHAUSE,
SCI Unit #1C 1st Shift Sgt., KEN
MILBECK, SCI Unit #1 Manager,
OFFICER OLSON, SCI Unit #1C
2nd Shift C.O., JOHN DOE, SCI
Unit #1C 2nd Shift Sgt., PAMELA
WALLACE, SCI Warden, BECKY
DRESSLER, SCI HSU Manager and
RN ARNEVIK, SCI Infectious Control
Nurse,¹

Respondents.

ORDER

08-cv-478-slc

Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate

¹Petitioner filed a motion to amend his complaint, dkt. #6, in which he asked the court to change K. Milbeck to Ken Milbeck and that RN Arnevik be added as a defendant. I will screen petitioner's initial complaint while including these minor changes.

Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the Western District of Wisconsin receive the attention they deserve in a timely manner. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the sole purpose of issuing this order, I am assuming jurisdiction over the case.

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner Peter Long, who is presently confined at the Redgranite Correctional Institution in Redgranite, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fee for filing this lawsuit. Petitioner has made the initial partial payment of \$32.64 as required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny him leave to proceed if he has had three or more lawsuits or appeals dismissed for lack of legal merit, or if his 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. I conclude that petitioner has stated a claim against respondents Jane Doe and Steger for violation of his Eighth Amendment rights. However, petitioner has failed to state a claim against respondents Sergeant Chause, Ken Milbeck, Officer Olson, John Doe, Pamela Wallace, Becky Dressler and RN Arnevik. Petitioner's motion for appointment of counsel will be denied.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Peter Long is a prisoner at the Redgranite Correctional Institution in Redgranite, Wisconsin, but at all times relevant to this lawsuit he was a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin. All respondents are employed at the Stanley Correctional Institution. Respondent Pamela Wallace is the warden and Becky Dressler is the Health Services Unit manager. Respondent Jane Doe is a nurse in the Health Services Unit and respondent RN Arnevik is an infectious control nurse. Respondent Officer Steger is a correctional officer and respondent Sergeant Chause a sergeant; both work first shift in Unit 1C. Respondent Ken Milbeck in the unit manager for Unit 1. Respondent Officer Olson is a correctional officer and respondent John Doe is a sergeant; both work second shift in Unit 1C.

B. Petitioner's Methicillin-Resistant Staphylococcus Aureus Infection

At 7:00 p.m. on July 25, 2006, petitioner was seen by the Health Services Unit because of an infection in the lower portion of his right leg. The nurse who examined petitioner provided him with oral antibiotics and told him that he should return to the Health Services Unit immediately if the infection spread beyond a four-inch circle the nurse drew on his leg.

On the morning of July 26, 2006, petitioner awoke with extreme pain in his right leg and he noticed that the infection had spread outside the circle the nurse had drawn on his leg. At approximately 11:00 a.m., petitioner contacted respondent Steger and requested medical attention. At approximately 11:30 a.m., Steger contacted the Health Services Unit to report that petitioner's infection had spread. Respondent Jane Doe told Steger to have petitioner file a "blue slip," which is a non-emergency medical request that results in a future scheduled appointment.

When the second-shift employees arrived in Unit 1C, petitioner again demanded medical attention. At approximately 4:05 p.m., respondent John Doe reported to the Health Services Unit that petitioner's infection had spread. Petitioner was seen by the Health Services Unit and immediately sent to Our Lady of Victory Hospital. Within two hours of being admitted at the hospital, petitioner underwent an operation on his leg. The surgeon cut open petitioner's leg to remove the infection. Petitioner's infection was identified as

Methicillin-Resistant Staphylococcus Aureus. Petitioner could have lost his lower right leg had the infection gone untreated. Petitioner remained in the hospital for seven days after the surgery and was connected to several IVs that provided petitioner with antibiotics to prevent further infection. Petitioner received morphine to combat the pain he experienced when his bandages were changed.

Upon returning to the Stanley Correctional Institution, petitioner filed a formal inmate complaint alleging that he had been denied prompt medical attention. The complaint was affirmed and the affirmation states that petitioner should have been seen by the Health Services Unit immediately after he reported that the infection had spread as opposed to being told to file a blue slip and having to wait four hours to be seen. Petitioner also contacted respondent Wallace to inform her about the spreading of Methicillin-Resistant Staphylococcus Aureus infection among inmates and requesting anti-bacterial soap. Petitioner filed an inmate complaint about not being provided anti-bacterial soap, but the complaint was dismissed.

On August 22, 2006, petitioner wrote a letter to the Wisconsin Department of Health and Family Services about the Methicillin-Resistant Staphylococcus Aureus infection “problem” at the Stanley Correctional Institution. Petitioner asked that the state take appropriate corrective action to reduce the spread of Methicillin-Resistant Staphylococcus Aureus infections. On September 13, 2006, petitioner received a response letter that

included a pamphlet with tips on preventing Methicillin-Resistant Staphylococcus Aureus infections. Petitioner believes that the Stanley Correctional Institution does not implement simple techniques for controlling the spread of Methicillin-Resistant Staphylococcus Aureus infections.

DISCUSSION

Petitioner has alleged two claims in his complaint: (1) that all respondents were negligent for not providing a safe and healthy living environment; and (2) that respondents Jane Doe, Steger, Chause, Milbeck, Olson, John Doe and Arnevik violated his Eighth Amendment rights because they were deliberately indifferent to his serious medical needs. I will address each of petitioner's claims in turn.

A. Conditions of Confinement

Petitioner contends that all respondents were negligent for not taking corrective action to improve the unsanitary and unhealthy institutional conditions that resulted in petitioner contracting a Methicillin-Resistant Staphylococcus Aureus infection. I understand petitioner to be asserting a claim of unsanitary conditions of confinement. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." Farmer v.

Brennan, 511 U.S. 825, 832 (1994). In order to constitute cruel and unusual punishment under the Eighth Amendment, conditions of confinement must be extreme. General “lack of due care” by prison officials will never rise to the level of an Eighth Amendment violation because “it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.” Whitley v. Albers, 475 U.S. 312, 319 (1986).

To demonstrate that prison conditions violated the Eighth Amendment, a petitioner must allege facts that satisfy a test involving both an objective and subjective component. Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994). The objective analysis focuses on whether prison conditions “exceeded contemporary bounds of decency of a mature, civilized society.” Id. The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to petitioner. Id.

To satisfy the objective analysis, petitioner would need to allege conditions evincing a serious disregard for his health. The following kinds of alleged conditions have been found to rise to the level of unsanitary conditions: a cell infested for sixteen months with cockroaches that crawled over the prisoner’s body, Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996); a cell in which there was mold and fiberglass in the ventilation ducts and evidence of severe nosebleeds and respiratory problems, Board v. Farnham, 394 F. 3d 469, 486 (7th Cir. 2005); or a cell in which the inmate was “forced to live with ‘filth, leaking

and inadequate plumbing, roaches, rodents, the constant smell of human waste, poor lighting, inadequate heating, unfit water to drink, dirty and unclean bedding, without toilet paper, rusted out toilets, broken windows, [and] . . . drinking water contain[ing] small black worms which would eventually turn into small black flies,” Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992).

Petitioner has failed to allege any objectively unsanitary conditions. Instead, I understand petitioner to be alleging that because he had a Methicillin-Resistant Staphylococcus Aureus infection, the prison conditions must be unsanitary. However, there are no allegations to support his belief that Methicillin-Resistant Staphylococcus Aureus infections occur in only unsanitary conditions as opposed to occurring in either sanitary or unsanitary conditions. Therefore, petitioner’s allegation that he suffered from a Methicillin-Resistant Staphylococcus Aureus infection does not provide an objective prison condition evincing a serious disregard for his health.

Regardless whether petitioner’s allegations survive the objective component of the analysis, petitioner’s claim fails the subjective component because he alleges that respondents were negligent regarding their response to prison conditions. Inadvertent error, negligence or even gross negligence are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). Therefore, petitioner has failed to state a claim for unsanitary conditions of confinement.

B. Deliberate Indifference to a Serious Medical Need

Petitioner contends that respondents Jane Doe, Steger, Chause, Milbeck, Olson, John Doe and Arnevik were deliberately indifferent to his serious medical needs because on July 26, 2006, he was not provided with immediate medical attention regarding the infection in his lower leg. Before addressing whether petitioner has stated an Eighth Amendment claim regarding deliberate indifference to a serious medical need, I conclude that respondents Chause, Milbeck, Olson, John Doe and Arnevik must be dismissed from the lawsuit because petitioner does not allege their personal involvement in depriving him of a constitutional right. 42 U.S.C. § 1983 governs alleged violations of an individual's constitutional rights. It is well established that liability under this statute must be based on a respondent's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987). Petitioner fails to explain how respondents Chause, Milbeck, Olson, John Doe and Arnevik were deliberately indifferent to his medical needs. According to petitioner's allegations, respondents Jane Doe and Steger were responsible for preventing petitioner from receiving immediate medical care from the Health Services Unit. Accordingly, petitioner fails to state a claim against respondents Chause, Milbeck, Olson, John Doe and Arnevik and they must be dismissed from the case.

With respect to medical care, the Supreme Court has held that "a prisoner must allege

acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs” to state an Eighth Amendment claim. Estelle v. Gamble, 429 U.S. 97, 106 (1976). This standard contains objective and subjective components. First, an inmate’s medical need must be objectively serious. A condition meets this standard if it is “one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor’s attention.” Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005). Petitioner’s infection required immediate surgery, which evinces that it was objectively serious.

The subjective element of a denial of medical care claim requires that the prison official act with a sufficiently culpable state of mind. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). This state of mind, known as deliberate indifference, requires at a minimum that a prison official be aware of and disregard a substantial risk to the inmate’s health. Greeno, 414 F.3d at 653. In other words, the official “must ‘both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists’ and ‘must also draw the inference.’” Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). According to petitioner’s allegations, he told respondent Steger about his extreme pain and the spread of his infection and, because she is a nurse with access to petitioner’s medical file, respondent Jane Doe knew about the concerns regarding petitioner’s infection. Plaintiff could not recover from respondent Jane Doe by showing only that she should have

known of his infection. Deliberate indifference requires actual knowledge of a substantial risk to an inmate's health. However, at this stage of the litigation, I will let petitioner proceed against this respondent. Despite both individuals' awareness of petitioner's medical condition, they did not provide him with immediate medical care. Therefore, petitioner will be granted leave to proceed on his Eighth Amendment claim against respondents Steger and Jane Doe.

C. Appointment of Counsel

In deciding whether to appoint counsel, I must first find that petitioner has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, petitioner must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Petitioner has provided a list of seventeen lawyers that turned him down. Although petitioner has made reasonable efforts to find a lawyer, he does not require appointment of counsel.

In resolving a motion for appointment of counsel, a district court must consider both the complexity of the case and the pro se plaintiff's ability to litigate it himself. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). In his motion, petitioner asserts that he has

limited legal knowledge, that his incarceration limits his ability to investigate the case and that an attorney would do better in presenting evidence. These are not good reasons to appoint counsel because these handicaps are universal among pro se litigants. To help petitioner in this regard, however, this court has provided a copy of this court's procedures for filing or opposing dispositive motions and for calling witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work. In sum, petitioner's limited knowledge of the law is not a circumstance warranting appointment of counsel and his motion will be denied.

ORDER

IT IS ORDERED that:

1. Petitioner Peter Long's request to proceed in forma pauperis on his claim that respondents violated his Eighth Amendment rights by being deliberately indifferent to his serious medical needs will be DENIED with respect to respondents Sergeant Chause, Ken Milbeck, Officer Olson, John Doe and RN Arnevik;
2. Petitioner's request to proceed in forma pauperis on his claim that respondents violated his Eighth Amendment rights by being deliberately indifferent to unsanitary prison conditions is DENIED for failure to state a claim upon which relief may be granted;
3. Respondents Sergeant Chause, Ken Milbeck, Officer Olson, John Doe, Pamela

Wallace, Becky Dressler and RN Arnevik are DISMISSED from this action. Respondents Wallace and Dressler will remain parties in this case for the sole purpose of assisting petitioner in learning the identity of the unnamed nurse, Jane Doe, who told respondent Steger to have petitioner fill out a blue slip. They will then be dismissed.

4. A strike is recorded against petitioner for including in his lawsuit a claim that failed for one of the reasons listed in 28 U.S.C. § 1915(g).

5. Petitioner Peter Long's request to proceed in forma pauperis on his claim that respondents violated his Eighth Amendment rights by being deliberately indifferent to his serious medical needs will be GRANTED with respect to respondents Jane Doe and Officer Steger.

6. 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 those 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.

7. 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.

8. The unpaid balance of petitioner's filing fee is \$317.36; 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. This court will notify the warden at Redgranite Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

9. 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.

10. Petitioner's motion for appointment of counsel, dkt. #9, is DENIED.

Entered this 2nd day of October, 2008.

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