IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBBE B. MILLER,

Petitioner,

v. ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS,[1] RANDALL HEPP, C. TAYLOR, DR. ADLER, TAMMY MAASEN, JODI DOUGHERTY, YOLANDA ST. GERMAINE, DAVID BURNETT, SHARON ZUNKER, JAMES GREER and KAREN GOULIE, 08-cv-62-bbc

Respondents.

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In this proposed civil action for declaratory and injunctive relief, petitioner Robbe B. Miller contends that respondents Randall Hepp, C. Tayor, Dr. Adler, Tammy Maasen, Jodi Dougherty, Yolanda St. Germaine, David Burnett, Sharon Zunker, James Greer and Karen Goulie violated his rights under the Eighth Amendment by denying him medicine and medical treatment and supplies and respondent Wisconsin Department of Corrections failed

[1]Petitioner Robbe B. Miller named the Wisconsin Department of Corrections in his complaint; the respondent was left out of the caption in earlier orders inadvertently. The caption has been amended to reflect the respondents named in petitioner's complaint.

to accommodate his disability in violation of the Americans with Disabilities Act. Petitioner has requested leave to proceed in forma pauperis and has paid the $23.52 initial partial filing fee.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, when 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 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 respondent who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2).

Because petitioner has alleged facts from which it may be inferred that respondent Adler was deliberately indifferent to his severe pain and difficulty walking without a cane, he will be granted leave to proceed against respondent Adler on his Eighth Amendment claim. Moreover, because the complaint allows an inference to be drawn that petitioner has a "disability" under the ADA that makes it difficult for him to walk and that respondent Adler knew of his disability and refused to accommodate his need within a Wisconsin Department of Corrections prison, petitioner will be granted leave to proceed on his ADA claim against respondents Adler and the Wisconsin Department of Corrections.

However, a decision will be stayed whether petitioner may proceed with his claims

that respondents Hepp, Tayor, Maasen, Dougherty, St. Germaine, Burnett, Zunker, Greer and Goulie exhibited deliberate indifference to his serious medical needs and violated his rights under the ADA because the allegations fail to make it clear whether these respondents relied on Adler's medical authority when denying petitioner's complaints against Adler. Petitioner will be allowed an opportunity to supplement his complaint with documentation of his complaints and appeals and responses he received before I decide whether to grant petitioner's request for leave to proceed on that claim.

Since filing his original complaint, petitioner has filed two documents written in the nature of an addendum to his complaint: a document titled "Statement of Claim," dkt. #5, and a document in which petitioner asks to add to his complaint additional facts and a more specific request for damages, dkt. #13. Because petitioner's complaint has not yet been screened, and because, even with the additional documents, petitioner's complaint satisfies Fed. R. Civ. P. 8, I will consider the three documents (dkts. ## 1, 5 and 13) jointly as the operative pleading.

I draw the following allegations of fact from petitioner's proposed complaint.

ALLEGATIONS OF FACT

A. Parties

Petitioner Robbe B. Miller is a prisoner at the Jackson Correctional Institution.

Respondent Randall Hepp is the warden, respondent Adler is a doctor at the institution; respondent Maasen is the manager and respondent Taylor is the supervisor of the health services unit at the institute. Respondents Burnett and Zunker work for the Department of Corrections, Bureau of Health Services.

Respondents Doughtery and St. Germaine are inmate complaint examiners and respondent Gourlie is the corrections complaint examiner.

B. Petitioner's Treatment by Respondent Adler and Health Services Unit Staff

Petitioner suffers from chronic pain, bone spurs, arthritis and degenerative joint disease in his right knee. Before the incidents at issue in this case, petitioner had gone through three surgeries related to his spinal cord: two unsuccessful discectomies to repair shattered discs and an emergency surgery on his spinal cord and neck to prevent certain risks of quadriplegia and even death. In addition, petitioner had been hospitalized for a disc space infection that ate away at his bone and damaged surrounding nerves and tissues. Because of his physical condition, petitioner has trouble walking without a cane.

Petitioner suffers from hepatitis C and has a history of bleeding ulcers. Most doctors would recommend against giving acetaminophen (Tylenol) to patients with Hepatitis C because it is a medicine that is "hard" on the liver. Before September 21, 2007, petitioner was taking a prescribed opiate (methadone) and a muscle relaxer for his back problems and

was allowed to use a cane. However, on September 21, 2007, respondent Adler discontinued petitioner's opiate and muscle relaxer prescriptions and took petitioner's cane away. Since then, petitioner has received only aspirin, ibuprofen or acetaminophen for his pain. This medication has been ineffective. In addition, petitioner has suffered several symptoms since being taken off the medications. He was physically ill for several months. He has experienced "virtually constant severe pain," muscle spasms and cramping and is losing the feeling in his left leg and his right arm. He is no longer able to do light exercise, with the exception of the long-distance walking (at least 400 yards) he is required to do to obtain medication, see the dentist or go to the library, among other things. These regular walks cause petitioner severe pain. At the same time, petitioner's inability to exercise more has caused him to lose all muscle tone in his back.

On or around December 25, 2007, petitioner bent over the wrong way and believes he herniated another disc. Medical staff at the Jackson Correctional Institution refused to see him for three weeks. When they finally saw petitioner, they did nothing but give him either aspirin, ibuprofen or Tylenol. In addition, petitioner is currently suffering from a "grinding of bone on bone" in his right knee that causes him constant pain and swelling. Moreover, the knee dislocates itself several times a day. Before his cane was removed, petitioner's right knee dislocated itself much less.

Petitioner suffers pain and spasms in his legs that cause his toes to curl up. This

causes petitioner's toes to "rip[] through the inner soles" and causes blood blisters on his toes. Respondent Adler refused to do anything about this issue, telling petitioner that his blood blisters will heal.

Petitioner has been asking Health Services Unit staff for treatment by a specialist in the repair and restoration of orthopedic needs and for further tests, such as magnetic resonance imaging. However, the staff has refused to find a specialist or perform the requested tests.

C. Failure to Intervene by Other Prison Officials

Petitioner filed a complaint in accordance with Department of Corrections procedures complaining about being deprived of his medication and his cane. The complaint was denied; petitioner appealed the complaint unsuccessfully "to the highest level."

In the process of complaining about his treatment, petitioner sent documentation of his condition and treatment to respondents Hepp, Taylor, Maasen, Dougherty, St. Germaine, Burnett, Zunker, Greer and Gourlie, including statements and medical records detailing his surgeries, surgeons, dates, places, procedures, complications, medications, physical therapy and pain management. Although any of these respondents could take action to correct the treatment, they have declined to do so.

Also apparently during the grievance process, respondent Adler made statements to "justify[] his actions," asserting that petitioner "is able to tie his shoes without any problems,

so he does not need pain medication," and "was able to walk to H.S.U. with no problem without his cane."

OPINION

A. Eighth Amendment Claims

Petitioner alleges that he has been forced to endure constant and severe pain because respondent Adler discontinued his opiate and muscle relaxant prescriptions and took away his cane, and that respondents Hepp, Tayor, Maasen, Dougherty, St. Germaine, Burnett, Zunker, Greer and Goulie failed to intervene on petitioner's behalf after petitioner filed inmate complaints or wrote to tell them of his inadequate treatment.

Generally, a complaint examiner cannot be held liable for rejecting an administrative complaint about a completed act of misconduct because "only persons who cause or participate in the violations are responsible. George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007). However, petitioner alleges rejection of a complaint related to an ongoing act of misconduct, the continued withholding of necessary treatment. Therefore, the respondents who examined his complaints alleging ongoing constitutional violations may be held liable.

The 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)). To state a claim under the Eighth Amendment, "a prisoner must allege 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 if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but failed to take reasonable measures to treat him. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, petitioner's claim has three elements:

(1) Did petitioner have a serious medical need?

(2) Did respondents know that petitioner needed treatment?

(3) Despite their awareness of the need, did respondents fail to take reasonable measures to provide the necessary treatment?

Petitioner alleges that he suffers constant severe pain, muscle spasms, a knee with bone-on-bone grinding that dislocates several times a day. Assuming these allegations are true, petitioner has a serious medical need.

The last two questions involve what each respondent knew and did. Petitioner alleges

two different kinds of involvement by respondents, direct treatment by respondent Adler and indirect review of petitioner's complaint by the other respondents. I consider each group separately.

As to respondent Adler, petitioner alleges that Adler treated him directly for his severe pain, muscle spasms and knee problems; therefore, Adler knew that petitioner needed treatment. At the same time, petitioner alleges that respondent Adler, "justifying his actions," asserted that petitioner was "able to tie his shoes without any problems, so he does not need pain medication," and "was able to walk to H.S.U. with no problem without his cane." However, at this early stage I must draw all inferences in petitioner's favor. Although it is possible to infer that respondent Adler did not believe petitioner and concluded that he did not have a serious medical need; it is possible also to infer that Adler saw that petitioner needed treatment but justified denying the treatment through false statements.

Moreover, it is possible to infer that respondent Adler's treatment was inadequate. Petitioner alleges that, in spite of his constant severe pain and muscle spasms, respondent Adler took away his cane and discontinued the opiate and muscle relaxant prescriptions. From then on, petitioner has had to walk without a cane and has received only acetaminophen, ibuprofen and aspirin for his severe and constant pain. At this stage, petitioner's allegations are sufficient to allow the inference that respondent Adler failed to take reasonable measures to provide the treatment necessary to address petitioner's needs.

As to the other respondents, petitioner alleges that they received documentation from him demonstrating his medical history and his current health problems. The allegations are far from clear on how these other respondents reached their respective decisions denying petitioner's complaint, but it appears that they considered both petitioner's assertions and Adler's statements. In general, it is not deliberate indifference for a non-medical complaint examiner to rely upon the opinion of the medical professional whose treatment is the subject of a complaint. Johnson v. Doughty, 433 F.3d 1001, 1010-11 (7th Cir. 2006); Greeno v. Daley, 414 F.3d 645, 656 (7th Cir. 2005). It is not clear from the allegations which of the respondents reviewing respondent Adler's decision were "medical professionals" (two are "health services" professionals) or what these respondents relied upon to make their respective decisions. Rather than dismiss petitioner's claims against the complaint examiners, I will give petitioner until May 5, 2008 to supplement his complaint to provide documentation of his use of the complaint system.

Because petitioner's complaint allows an inference to be drawn that respondent Adler was deliberately indifferent to his serious medical needs, petitioner will be granted leave to proceed on his Eighth Amendment claims against respondent Adler. A decision regarding petitioner's request for leave to proceed on his claims against the other respondents will be stayed until May 5, 2008.

B. Americans with Disabilities Act

Next, plaintiff contends that respondents violated his rights under the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134, which prohibits discrimination against qualified persons with disabilities. Title II of the Americans with Disabilities Act states that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . . ." 42 U.S.C. § 12132. State prisons are considered public entities under the ADA. Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 210 (1998) (citing 42 U.S.C. § 12131(1)(B)). To be a "qualified individual with a disability," an individual must have a "disability," defined under the ADA as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual[.]" 42 U.S.C. § 12102(2)(A).

Petitioner alleges that he has trouble walking without a cane; although he walks over 400 yards several times a day, he does so in severe pain and at risk of further injury in order to perform basic functions such as seeking out prescribed medications. Thus, it is possible to infer that petitioner should walk far less than he actually does. Compare E.E.O.C. v. Sears, Roebuck & Co., 233 F.3d 432, 438 (7th Cir. 2000) (inability to walk more than one city block may be basis for finding that impairment is "substantially limiting") with Moore v. J.B. Hunt Transport, Inc., 221 F.3d 944, 951 (7th Cir. 2000) (arthritis affecting only the

"rate and pace" of mile long walk does not constitute substantially limiting impairment). From petitioner's allegations it is possible to infer that respondent Adler, working within the prison system, "denied" petitioner some of the basic services of the prison by denying him a cane when petitioner had to walk long distances in severe pain to seek out prescribed medications.

Moreover, respondent Wisconsin Department of Corrections is the prison system that includes the prison where petitioner is allegedly denied accommodation, and qualifies as a "public entity" that may be held liable under the ADA for actions that violate the Eighth Amendment. Although a state agency such as the Wisconsin Department of Corrections would not be a "suable entity" under 42 U.S.C. § 1983, Will v. Michigan Department of State Police, 491 U.S. 58 (1999) (state is not "person" under federal civil rights statutes), and is generally immune from private suit under the doctrine of sovereign immunity, Title II of the ADA abrogates state sovereign immunity to allow a private suit against a state or state agency for conduct that "actually violates" the Fourteenth Amendment, including acts of "cruel and unusual punishment" (incorporated into the Fourteenth Amendment from the Eighth Amendment). United States v. Georgia, 546 U.S. 151 (2006). Thus, the Wisconsin Department of Corrections may be sued under the ADA for violations that overlap with Eighth Amendment violations. Id.; see also, Wis. Stat. § 301.04 (Department of Corrections may sue and be sued).

Petitioner has stated a claim for an Eighth Amendment violation related to his ADA claim. Therefore, petitioner's allegations suffice to state a claim that respondents Adler and Wisconsin Department of Corrections failed to provide reasonable accommodations (in the form of a cane) for his alleged disability.

C. Motion for Preliminary Injunction

After filing his original complaint, petitioner filed a document in which he requested an injunction. I construe his request as a motion for a preliminary injunction. The motion is not supported by any affidavit. In the motion, petitioner asks the court to order respondents to (1) return his cane; (2) put him back on 10 milligrams of methadone and the muscle relaxant he was on before respondent Adler discontinued them; and (3) arrange to have petitioner evaluated by an orthopedic specialist.

This court requires a party seeking emergency injunctive relief to follow specific procedures for obtaining such relief. Those procedures are described in a document titled Procedure To Be Followed On Motions For Injunctive Relief, a copy of which is included with this order. Petitioner should pay particular attention to those parts of the procedure that require him to submit proposed findings of fact in support of his motion and point to admissible evidence in the record to support each factual proposition.

Moreover, to obtain a preliminary injunction, a moving party must meet an exacting

standard. Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992). A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are: 1) whether the petitioner has a reasonable likelihood of success on the merits; 2) whether the petitioner will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; 3) whether the threatened injury to the petitioner outweighs the threatened harm an injunction may inflict on respondent; and 4) whether the granting of a preliminary injunction will disserve the public interest. Pelfresne v. Village of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). At the threshold, petitioner must show some likelihood of success on the merits and that irreparable harm will result if the requested relief is denied. If petitioner makes both showings, the court then moves on to balance the relative harms and public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

Petitioner has submitted no affidavits or other admissible evidence to support his request for an injunction and he has not proposed facts in reliance on such evidence. Because petitioner has neither followed the procedures for preliminary injunctive relief nor made the necessary showing of entitlement to such relief, his motion will be denied without prejudice.

D. Motion for Appointment of Counsel

Petitioner has submitted a motion for 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 asked to represent him in this case and who turned him down.

Because petitioner has not shown that he has made reasonable efforts to find a lawyer, his motion for appointment of counsel will be denied without prejudice. Petitioner should be aware that even if he shows that he has made reasonable efforts to find a lawyer and failed, that does not mean that one will be appointed for him. At that point, the court must consider "whether the difficulty of the case-factually and legally-exceeds the particular petitioner's capacity as a layperson to coherently present it to the judge or jury himself." Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007).

ORDER

IT IS ORDERED that:

1. Petitioner Robbe B. Miller's request to proceed in forma pauperis is GRANTED with respect to:

(a) his claim that respondent Adler exhibited deliberate indifference to his serious medical needs by denying him a cane and failing to properly treat his pain and injuries; and

(b) his claim that respondents Adler and Wisconsin Department of Corrections violated his rights under the ADA by denying him a cane.

2. A decision is STAYED whether petitioner may proceed with his claim that respondents Randall Hepp, C. Tayor, Tammy Maasen, Jodi Dougherty, Yolanda St. Germaine, David Burnett, Sharon Zunker, James Greer and Karen Goulie exhibited deliberate indifference to his serious medical needs and violated his rights under the ADA by failing to intervene when respondent Adler failed to provide him with a cane or properly treat his pain and injuries. Petitioner may have until May 5, 2008 in which to supplement his complaint with documentation of his complaints and appeals and the responses he received to his complaints and appeals. If, by May 5, 2008, petitioner fails to submit the required documentation, I will enter an order dismissing his claims against those 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 $326.48; petitioner is obligated to pay this amount in monthly installments, as described in 28 U.S.C. § 1915(b)(2).

Entered this 22nd day of April, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge