

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

DARRICK JORDAN, #307484,

Petitioner,

v.

PAM WALLACE (Warden, CVCTF),
THOMAS KARLEN (Deputy Warden, CVCTF),
TOBIAS TURON (DDS, CVCTF),
LISA YEAGER (Dental Services, CVCTF),
BECKY DRESSLER (Nursing Supervisor, CVCTF),
BARBARA DE LAP (Dental Services, Madison),
STEVEN SCHELLER (Dental Division, Portage),
SHARON ZUNKER (Title unknown, Madison),
COMPLAINT EXAMINERS, et al. (involved in
exhaustion of administrative remedies),

Respondents.

OPINION and
ORDER

08-cv-210-bbc

This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner is presently confined at the Chippewa Valley Correctional Facility in Chippewa Falls, Wisconsin. Although he paid the \$350 filing fee in full, because he is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915A. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if,

even under a liberal construction, it is legally frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. 42 U.S.C. § 1915(e).

From my review of plaintiff's complaint, I conclude that petitioner has alleged sufficient facts to support a claim that respondents Tobias Turon, Lisa Yeager, Becky Dressler, Barbara De Lap, Steven Scheller and Sharon Zunker are being deliberately indifferent to petitioner's serious dental health care needs. Petitioner's allegations do not support such a claim against respondents Pam Wallace, Thomas Karlen, and Complaint Examiners Dawn Koeppen, Welcome Rose and Amy Smith. Therefore, these respondents will be dismissed from the case.

Petitioner should be aware that this court will not dismiss a case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion for summary judgment pursuant to Fed. R. Civ. P. 56. See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

From his complaint and the documents attached to it, I understand petitioner to be alleging the following facts.

ALLEGATIONS OF FACT

In early November of 2007, a transport company contracted by Brown County transferred petitioner from the Brown County jail to the Dodge Correctional Facility in Waupun, Wisconsin. Soon after his arrival, petitioner discovered his dentures had been lost by the jail, the transport company or Dodge Correctional Facility staff.

On November 26, 2007, petitioner was designated as in need of dental services. He arrived at the Chippewa Valley Correctional Facility in late December. Since that time, he has been attempting to see a dentist who will address his need for dentures and the problems he is having with bleeding and swelling gums and swelling in his throat. Although petitioner asked for a rinse or solution of some type to prevent infection in his “open wounds,” he did not receive a rinse until sometime in April 2008. Because of petitioner’s dental problems, he has difficulty digesting food, which causes him stomach problems and loss of weight. Often, he cannot sleep because of the pain.

On January 15, 2008, petitioner filed grievance no. CVTF-2008-1867, complaining that his dentures had not been replaced and that his gums were bleeding from eating, that he could not eat all of his meals and that he was hungry. In response to this grievance, respondent Dawn Koeppen, (identified in the caption of petitioner’s complaint as “Complaint Examiners et al.”), an institution complaint examiner, filed an “ICE Report” dated February 4, 2008, in which she indicated that she had spoken with respondent Turon,

the facility's dentist, respondent Yeager, who works in the facility's dental services section, and an officer at the Brown County jail. Koeppen recommended dismissal of petitioner's grievance "with modification" for the following reasons:

The complainant was interviewed on 1/15/08; he states that his teeth were lost between transit from County Jail and DCI. The dentures never arrived at Dodge. In addition, the Inmate's family picked up some of his property and the dentures were not in it. When he arrived at Dodge staff told him to put in for dentures when he gets to the next Institution, which is CV Dental Services. There is no incident report documented. CV Dental Services say I need an incident report. Can I get my teeth replaced, my gums bleed from eating, cannot eat all of my meals, hungry. The Inmate informed this ICE that he wrote to Brown Co. Jail on 11/9/07 (#920-448-4250) and they never responded to him about his dentures.

This ICE contacted the Jail per the Inmate's authorization on 1/31/08. CO Jeff Lelinski researched the issue and reported that there is no documentation on dentures; however, it is noted in the Inmate's medical file that he has no teeth. There is no documentation in the log relating to any issues about dentures or a letter being received from the Inmate inquiring about the dentures. The Inmate's original dentures were paid for by the Oneida Tribe and he would like new dentures, as he states he has difficulty eating since his dentures have been lost. The Inmate states he will be incarcerated until January 2009.

This ICE spoke with Dr. Turon regarding the fact that he Inmate [sic] is having difficulty eating and his gums bleed when he eats certain foods from rubbing on his gums. Dr. Turon will assess the Inmate's denture issue/need and determine what action to take regarding the Inmate's request for dentures. The Inmate's concerns are documented and will be submitted to the Regional Nursing Coordinator of Health Services for review and decision.

It is recommended that this complaint be dismissed with modification; the modification is that Dr. Turon be copied in for informational purposes.

Also on February 4, 2008, respondent Sharon Zunker accepted ICE Koeppen's recommendation for dismissal with modification of petitioner's grievance no. CVTF-2008-1867 saying,

Mr. Jordan entered WDOC on 11/8/07. He has no teeth. Dr. Turon to assess the inmate's dentition and determine need for dentures. Please also order a soft diet for this inmate until such time as his dental condition is resolved.

Respondent Zunker sent a copy of her dismissal with modification to respondents Becky Dressler, a nursing supervisor, respondent Barbara DeLap, who petitioner alleges is an employee of the "Dental Division" in Madison and Steven Scheller, who petitioner alleges is an employee of the "Dental Division" in Portage.

On March 4, 2008, when petitioner had still not been examined by respondent Turon, petitioner filed a "Request for Corrections Complaint Examiner Review" of respondent Zunker's February 4, 2008 dismissal of petitioner's grievance no. CVTF-2008-1867. He noted in the request that he understood that normally, he would have to meet certain time deadlines for filing an appeal, but that under the circumstances, he wished them to be waived. He explained,

Under the situation which complainant to believe the issue was to be resolved and taken care of, and had it been there would [be] no need to take further steps in the chain of command. And refusal to follow up with recommendation/modification, had not mislead the complainant the time limits would have been met promptly.

You will note that the modification was made on 2/4/08, and the date which

this is now being filed is 3/4/08. There is no reason a inmate should be forced into discomfort or poor eating habits resulting from such refusal. And this is also been of an issue since 11/8/08.

This issue apparently cannot be handled within the institution (CVCTF) and outside attention is needed to prevent these situations from occurring repeatedly. Included you will find copies of the prior complaint and decisions. There is also been request to dental services two a week. Thank you. [sic]

On March 10, 2008, respondent Corrections Complaint Examiner Welcome Rose (also listed in the caption of petitioner's complaint as "Complaint Examiners et al.") recommended dismissal of petitioner's appeal stating,

S. DOC 310.13(1), Wis. Adm. Code, requires appeals to be received and accepted at the CCE office within ten calendar days of the complaint decision. Noting the complaint was decided and reported printed on or before 02/05/08, the appeal was not received until 03/10/08, and further noting the complainant offers no good cause for the late submission, it is recommended this appeal be dismissed as untimely.

Once a complaint is affirmed at the institution level, the institution has 30 working days to implement it (s. DOC 310.15(1), Wis. Adm. Code). If it has not been implemented within that time period, the complainant may directly inform the decision-maker in writing of that failure. The inmate's complaint had been affirmed on 02/04/08. If the decision has not been implemented by 3/18/08, the inmate may write to the decision-maker, Regional Nursing Coordinator Zunker. For informational purposes, Ms. Zunker and health services staff should be notified of this appeal.

A copy of respondent Rose's March 10, 2008 recommendation was sent to respondents Turon, Yeager, Dressler, De Lap and Scheller.

On March 16, 2008, respondent Amy Smith (listed in the caption of petitioner's

complaint as “Complaint Examiners et al.) accepted respondent Rose’s recommendation and dismissed petitioner’s appeal.

Meanwhile, on March 4, 2008, petitioner attempted to file a second grievance to complain about respondent Turon’s failure to assess his dental needs as respondent Zunker had indicated he had been asked to do in response to petitioner’s first grievance. Respondent Koeppen rejected this complaint on the ground that the issue raised had been addressed in petitioner’s earlier grievance. That same day, petitioner prepared a “Request for Review of Rejected Complaint” and sent it to respondent Warden Pam Wallace’s office. On March 10, 2008, respondent Deputy Warden Karlen determined that petitioner’s second grievance was appropriately rejected. In his reason for decision, Karlen stated,

This complaint was appropriately rejected by the ICE. Inmate, as stated previously, is on list for dentist. Inmate also offered soft diet while waiting.

Despite the numerous complaints petitioner has filed, respondent Turon has not conducted “any sort of assessment or evaluation” to properly determine petitioner’s treatment needs. Petitioner has not been seen “by any staff” that may be able to determine what treatment he needs.

OPINION

Deliberate indifference to prisoners' serious medical needs constitutes the unnecessary

and wanton infliction of pain proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). To state a deliberate indifference claim, “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” Id. at 106. In other words, petitioner must allege facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

“Serious medical needs” encompass (1) conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and (3) conditions that have been “diagnosed by a physician as mandating treatment.” Gutierrez, 111 F.3d at 1371-73. Petitioner’s allegations suggest that he experiences severe pain while eating, including soreness and discomfort in his gums. These allegations of pain and suffering are sufficient to suggest a serious dental condition. Gutierrez, 111 F.3d at 1372 n.7 (given liberal pleading standards for pro se complaints, “the ‘seriousness’ determination will often be ill-suited for resolution at the pleading stage”).

To show deliberate indifference, petitioner must establish that a respondent was “subjectively aware of the prisoner’s serious medical needs and disregarded an excessive risk that a lack of treatment posed” to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir.

2001). Although a negligent or inadvertent failure to provide adequate medical or dental care does not amount to deliberate indifference because such a failure is not an “unnecessary and wanton infliction of pain,” Estelle, 429 U.S. at 105-06, a prison official need not have intended or hoped for the harm that the inmate suffered in order to be held liable under the Eighth Amendment. Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996).

The Court of Appeals for the Seventh Circuit has held that to recover damages under § 1983, a petitioner must establish each respondent's personal responsibility for the claimed deprivation of a constitutional right. A respondent's direct participation in the deprivation is not required. Instead, an official satisfies the personal responsibility requirement "if she acts or fails to act with a deliberate or reckless disregard of petitioner's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). In order for a supervisory official to be found liable under §1983, there must be a " causal connection, or an affirmative link, between the misconduct complained of and the official sued." Smith v. Rowe, 761 F.2d at 369; Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983).

Petitioner will be granted leave to proceed against respondents Turon, Yeager, Dressler, De Lap, Scheller. Each of these respondents was informed of petitioner’s need for dental health care either directly during respondent Koeppen’s investigation of petitioner’s

grievance no. CVTF-2008-1867, or indirectly through copies of respondents Koeppen's and Zunker's written responses to petitioner's grievance and each failed to take any action to address petitioner's needs. These allegations are sufficient to state a claim of deliberate indifference to petitioner's serious dental health care needs against respondents Turon, Yeager, Dressler, De Lap and Scheller.

In addition, I will allow petitioner leave to proceed on his claim against respondent Sharon Zunker. According to petitioner's allegations, Zunker first became aware of petitioner's serious dental health care needs at the time she accepted respondent Koeppen's recommendation to dismiss petitioner's first grievance with modification. At that time, she accepted the recommendation to dismiss on the understanding that, as reported by Koeppen, respondent Turon had been contacted and had agreed to assess petitioner's needs. Her dismissal of petitioner's grievance under this circumstance does not evince deliberate indifference to petitioner's serious dental health care needs. However, Zunker became aware a second time of petitioner's unmet dental needs on March 4, 2008, when respondent Welcome Rose sent her a copy of her recommendation to dismiss petitioner's appeal. Her alleged failure to take action to insure that petitioner was receiving the care she knew he needed and had been told he would get supports a claim that she may have violated petitioner's Eighth Amendment rights.

Petitioner will not be allowed to proceed against respondent Koeppen, Rose, Smith,

Wallace or Karlen, because he has not alleged any facts from which an inference may be drawn that these individuals were deliberately indifferent to his serious dental health care needs.

Respondent Koeppen conducted a thorough investigation into petitioner's complaint and determined that respondent Turon would take the necessary steps to attend to petitioner's needs. Respondent Rose recommended dismissal of petitioner's appeal and respondent Smith acted on that recommendation, on the understanding that petitioner could use Wis. Adm. Code § DOC 310.15 to inform respondent Zunker directly about the failure of the prison's dental providers to implement her earlier modified dismissal of petitioner's complaint. In addition, respondent Rose insured that Zunker was so informed by sending a copy of her dismissal of the appeal to Zunker on petitioner's behalf.

Petitioner alleges no facts suggesting that respondent Wallace had any knowledge of his situation. The only allegation concerning Wallace is that petitioner sent an appeal from the rejection of his second grievance to the office of the warden. Petitioner does not suggest that respondent Wallace saw the appeal, and his allegation that the deputy warden, respondent Karlen, responded to the appeal suggests that he did not. In any event, it was not a violation of petitioner's Eighth Amendment rights for respondent Koeppen to reject petitioner's second grievance while avenues remained open to petitioner to resolve his first grievance and respondent Karlen or respondent Wallace or both were entitled to uphold that

rejection.

One further matter requires attention. After he filed his complaint, petitioner moved for a preliminary injunction. In his motion, petitioner alleges that as of May 8, 2008, the date his motion is signed, he has been provided no treatment and is suffering. Unfortunately, petitioner's motion contains only vague and conclusory allegations concerning his current health and respondents' failure to act and does not comply with this court's procedures for obtaining a preliminary injunction. Under these procedures, which I am enclosing to petitioner with a copy of this order, petitioner must file with the court and serve on respondents proposed findings of fact supporting his claim, and submit with his proposed findings of fact any evidence he has to support his request, such as an affidavit explaining what steps he has taken to obtain dental health care or authenticated copies of his dental records showing the failure of the dental health care staff to attend to his needs. If petitioner submits such a motion, I will set a short deadline within which respondents will be required to respond to it. For now, however, I will deny petitioner's motion for preliminary injunction for petitioner's failure to comply with this court's procedures.

ORDER

IT IS ORDERED that

1. Petitioner Darrick Jordan is GRANTED leave to proceed on his claim that

respondents Tobias Turon, Lisa Yeager, Becky Dressler, Barbara De Lap, Steven Scheller and Sharon Zunker violated his Eighth Amendment rights by refusing to respond to his serious dental health care needs.

2. Petitioner Darrick Jordan is DENIED leave to proceed on his claim that respondents Pam Wallace, Thomas Karlen, and Complaint Examiners Dawn Koeppen, Welcome Rose and Amy Smith violated his Eighth Amendment rights because petitioner's allegations fail to state a claim that these respondents were deliberately indifferent to petitioner's serious dental health care needs.

3. A strike is recorded against petitioner for raising in his complaint in this case claims against respondents Wallace, Karlen, Koeppen, Rose and Smith that were required to be dismissed for petitioner's failure to state a claim upon which relief may be granted against them.

4. Petitioner's motion for a preliminary injunction (Dkt. #7) is DENIED without prejudice to petitioner's refiling a motion that is in compliance with this court's Procedures to be Followed on Motions for Injunctive Relief, a copy of which is enclosed to petitioner with a copy of this order.

5. For the remainder of this lawsuit, petitioner must send a copy of every paper or document that he files with the court to respondents' lawyer, Assistant Attorney General Jody Schmelzer. The court will disregard any documents submitted by petitioner unless

petitioner shows on the court's copy that he has sent a copy to Ms. Schmelzer.

6. 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.

7. Pursuant to this court's order of May 23, 2008, respondents have 40 days from the date of this order in which to file their responsive pleading.

Entered this 27th day of May, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge