

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

ADEKUNLE ADEFEYINTI,

Petitioner,

v.

DODGE COUNTY DETENTION FACILITY,
MEDICAL STAFFS AND DCDF OFFICERS,
OFFICER BAKER, OFFICER RHODE,
OFFICER BORN, OFFICER POLAH, NURSE
HORVATH, NURSE JODI and VICKI
NELSON,

Respondents.

OPINION and ORDER

08-cv-319-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 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 purpose of issuing this order only, I am assuming jurisdiction over the case.

Petitioner Adekunle Adefeyinti, a prisoner at the Kenosha County Detention Center in Kenosha, Wisconsin, has submitted a proposed complaint and has requested leave to proceed in forma pauperis on his claims that he was denied adequate medication, dental care and access to the courts while he was housed at the Dodge County Detention Center in Juneau, Wisconsin. Petitioner has no means with which to pay an initial partial payment of the \$350 fee for filing his complaint.

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 ask 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.

ALLEGATIONS OF FACT

A. Parties

Petitioner is a prisoner who is presently detained at the Kenosha County Detention

Center in Kenosha, Wisconsin. At times relevant to this complaint, he was detained at the Dodge County Detention Facility in Juneau, Wisconsin. Respondents Nurse Hovarth, Nurse Jodi and Vicki Nelson are members of the medical staff at the Dodge County Detention Facility. Respondents Baker, Born, Rhode and Polah are correctional officers at the Dodge County Detention Facility. Respondent Born is a supervisor.

B. Dental Care

On May 5, 2008, petitioner was experiencing severe tooth pain and asked to visit the dentist. On May 7, 2008, an unidentified member of the medical staff told him that there was no dentist at the facility at that time, but that he could request pain medication. On May 8, 2008, petitioner again asked to see a dentist. The same day, he was told that he could see a dentist if one was “found” or when he was sent to a facility that had a dentist. Instead of seeing a dentist, petitioner was “called for [a] doctor visit” on May 8. At that time, he was examined by respondent Nelson. She examined his tooth and promised to provide petitioner with pain-relieving oral gel. However, petitioner never received the gel, in spite of his requests to numerous nurses when they visited his unit.

As a result of his tooth pain, petitioner was unable to chew any food or drink water for five days and was “left in pain” for more than 10 days. In response to a grievance petitioner submitted on May 8, prison staff told him that the facility was “working on

getting a dentist.”

C. Medication

Petitioner had a prescription for Zantac to treat a chronic ulcer. His pills were white in color. On May 11, 2008, respondent Nurse Jodi was distributing medication. She gave petitioner a pink pill instead of his Zantac. Before petitioner took the pill, he told Nurse Jodi that she had given him the wrong medication. She told him that if he would not take the medication, she would note in his record that he had refused medication. Petitioner asked to see the label of the medication she had given him, but Nurse Jodi refused to allow him to see it.

After petitioner took the medication, he became dizzy and remained dizzy all night. The next morning, petitioner told respondent Hovarth that Nurse Jodi had given him the wrong medication the night before. Respondent Hovarth told petitioner in an aggressive tone of voice that he needed a psychiatrist and gave him the same pills he had received the night before. He asked to see the container. Several hours later she brought him a container with both colors of pills inside. It was marked with a black marker and did not say that it was Zantac.

D. Denial of Access to Legal Materials

Because petitioner had no money to pay for copies (which cost 10 cents each), all of his requests for copies of legal documents and to use the computer to prepare documents were denied by officers at the Dodge County Detention Facility. The officers who denied him legal materials were respondents Rhode, Polah, Baker and Born.

Petitioner made “several” requests for copies of legal documents, including a request on May 4, 2008 for a legal envelope and a floppy disk containing all of the discovery in his immigration case. Petitioner needed the information on the disk and other immigration documents in order to mail his appeal to the Immigration Board of Appeals. Respondent Rhode denied petitioner’s request for the materials. Respondent Polah denied petitioner’s grievance regarding the denial, stating “no money, no copies.” Because of this denial, petitioner missed the 30-day deadline in which he could appeal the decision of the Immigration judge.

On May 10, 2008, petitioner prepared a motion to the Board of Immigration Appeals, in which he explained why he had missed the deadline for appeal. After petitioner printed out copies of the motion, respondent Baker took the motion and told him that he could not have it because he had no money to pay for the copies. Petitioner filed a grievance regarding respondent Baker’s actions. Respondent Born denied the grievance.

DISCUSSION

A. Dental Care

Petitioner raises two claims related to his medical care while he was housed at the Dodge County Detention Facility. First, petitioner contends that respondent Nelson was deliberately indifferent to his need for treatment for his severe tooth pain when she promised him pain-relieving oral gel on May 8, 2008, but failed to insure that he received it. Next, he alleges that respondent Nurse Jodi gave him the wrong medication on one occasion, that this medication made him dizzy overnight and that respondent Hovarth told him that two pills of different colors were both his ulcer medication.

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 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 the condition causes serious 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). However, “the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense.” Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir.1985). “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).

1. Dental care

In evaluating petitioner’s claim, the first question is whether petitioner’s toothache could constitute a serious health care need. Petitioner alleges that the pain of his toothache was so severe that he was unable to chew any food or drink water for five days. As noted above, a condition that causes serious pain may constitute a serious health care need. Cooper, 97 F.3d at 917. Therefore, given petitioner’s allegation that he was suffering from severe pain from his toothache, it is reasonable to conclude that his toothache was a serious health care need.

The remaining question is whether respondent Nelson’s response to petitioner’s request for treatment for his toothache could constitute deliberate indifference. Again, deliberate indifference is a high standard; inadvertent error, negligence, gross negligence or

even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). Petitioner alleges that respondent Nelson promised him pain-relieving oral gel during her examination of him, but failed to insure that he received it. At worst, if respondent Nelson knew that prescriptions were regularly not delivered to prisoners, it may have been negligent for her to fail to follow-up to make sure that petitioner had received the recommended medication. However, it would be entirely speculative to assume that respondent Nelson never actually meant to withhold the medication from petitioner, or acted with reckless disregard to whether he received it. Therefore, petitioner will be denied leave to proceed on his claim against respondent Nelson.

2. Medication

Next, I turn to petitioner's allegation that he received the wrong medication from respondent Nurse Jodi on May 11, 2008. The Supreme Court has held that deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." Farmer, 511 U.S. at 837. Even if I infer from petitioner's allegations that Nurse Jodi knew that she was giving petitioner the incorrect medication, there is no support for his claim that she exhibited deliberate indifference to a substantial risk of serious harm to him because the harm he suffered—dizziness for a short period of time—is not sufficiently serious

to support an Eighth Amendment claim. Petitioner will be denied leave to proceed on his claim against respondent Nurse Jodi.

Finally, petitioner's claim against respondent Hovarth is even more tenuous. He asserts that she was rude to him, ignored his complaint about Nurse Jodi and told him that two pills of different colors were both his ulcer medication. Respondent Hovarth's dismissive behavior may suggest a poor attitude toward prisoners, but there is no indication that petitioner was harmed or even exposed to a risk of harm, as a result of respondent Hovarth's actions. Therefore, petitioner will be denied leave to proceed on his claim against respondent Hovarth as well.

3. Access to courts

Finally, petitioner asserts that respondents' refusals to allow him to photocopy materials for free interfered with his ability to pursue an appeal with the Board of Immigration Appeals. It is well established that prisoners have a constitutional right of meaningful access to the courts to pursue nonfrivolous actions. Lewis v. Casey, 518 U.S. 343 (1996). Less well established is what supplies a prison must provide in order to allow meaningful access. At a minimum, prisons are required to provide prisoners with basic materials necessary to pursuing a lawsuit. Bounds v. Smith, 430 U.S. 817, 824-25 (1977) ("... [i]ndigent inmates must be provided at state expense with paper and pen to draft legal

documents with notarial services to authenticate them, and with stamps to mail them.”).

However, despite courts’ willingness to suggest that prisons have some affirmative duty to assist prisoners in securing minimally sufficient supplies to litigate their lawsuits, the Court of Appeals for the Seventh Circuit has held repeatedly that prisoners have “no constitutional entitlement to subsidy.” Lindell v. McCallum, 352 F.3d 1107, 1111 (7th Cir. 2003); Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) (“The right to petition for redress of grievances does not imply a right to free writing paper and stamps.”); see also Johnson v. Daley, 339 F.3d 582, 586 (7th Cir. 2003) (prisoners have no constitutional right to have their adversaries or public treasury defray all or part of cost of civil litigation). In this case, petitioner contends that he was entitled to photocopies of materials and pleadings, regardless whether he was able to pay for them. However, whatever responsibility the prison had to provide petitioner with free copies of legal materials, there is no indication that a refusal to provide photocopies caused petitioner to be unable to pursue his appeal. It would be sheer speculation to suppose that petitioner was prevented from hand-writing his pleadings to the Board of Immigration Appeals or that the Board would reject plaintiff’s handwritten materials. Because petitioner was denied copies only and not access to other materials with which he could have prepared his filing with the Board, I conclude that he does not state a claim for denial of access to courts.

Even if I were to postulate that the only way that petitioner could submit basic legal

materials to the Board was in typewritten, duplicate form, petitioner's complaint falls short for another reason. The court of appeals has held that to support a denial of access to courts claim, a prisoner is required to allege in his complaint not only that he has been denied access to the courts but also that he "has suffered an injury over and above" the denial of access to a court. Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). The reason for this "heightened standard" is simple:

[T]he mere denial of access to . . . legal materials is not itself a violation of a prisoner's rights; his right is to access the courts, and only if the defendants' conduct prejudices a potentially meritorious challenge to the prisoner's conviction, sentence, or conditions of confinement has this right been infringed.

Marshall v. Knight, 445 F.3d 965, 968 (7th Cir. 2006). In this case, petitioner states that he was not able to appeal his immigration decision in a timely manner. If prison officials prevented petitioner from pursuing his appeal *at all*, this might provide the grounds for an access-to-courts claim. However, petitioner himself indicates that he understands that there is an opportunity to convince the Board of Immigration Appeals to waive its filing deadline for appeals. Perhaps now that petitioner has been moved to a facility where he is able to prepare typed legal documents he has filed his appeal. Or perhaps he has tried to file an untimely appeal but has been refused. Because petitioner's complaint does not include this information, I cannot infer that respondents' refusals to allow petitioner to make free photocopies led to any lasting adverse outcome.

ORDER

IT IS ORDERED that:

1. Petitioner Adekunle Adefeyinti's request for leave to proceed in forma pauperis on his claims that he was denied adequate medication and dental care and access to the courts is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;
2. The unpaid balance of petitioner's filing fee is \$350; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
3. A strike will be recorded against petitioner pursuant to § 1915(g); and
4. The clerk of court is directed to close the file.

Entered this 14th day of July, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge