

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

LERVOLTIS LUCKETT,

Petitioner,

v.

PETER HUIBREGTSE, Warden,
NURSE MORA, ELLEN RAY, Examiner,
NURSE AMY and DR. COX,

Respondents.

ORDER

08-cv-449-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 sole purpose of issuing this order, I am assuming jurisdiction over the case.

This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Green Bay Correctional Institution in Green Bay, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. In addition, petitioner asks for appointment of counsel to represent him in this action, dkt. #3. 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 paid the initial partial payment of \$0.40 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, if 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 defendant who by law cannot be sued for money damages. I conclude that petitioner has failed to state a Eighth Amendment claim for deliberate indifference to a serious medical need, which makes petitioner's motion for appointment of counsel moot.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Lervoltis Lockett is a prisoner confined at the Green Bay Correctional Institution in Green Bay, Wisconsin. The respondents are employed at the Green Bay Correctional Institution. Respondent Peter Huibregtse is the warden. Respondents Nurse Mora and Nurse Amy are nurses. Respondent Dr. Cox is a doctor. Respondent Ellen Ray is a complaint examiner.

B. Petitioner's Injury

On October 18, 2007, at approximately 4:56 p.m., petitioner accidentally swallowed a sharp object embedded in some vegetables. Swallowing the sharp object caused petitioner pain and his throat to bleed. Upon seeing the blood, petitioner pressed the medical button and an officer was sent to investigate petitioner's injury. Sergeant Laxton notified Health Services Unit regarding petitioner's injury.

At 6:05 p.m., respondent Mora arrived to examine petitioner's injury. Petitioner presented Mora with the bloody towel he had been using and told her about the incident. Nevertheless, she refused to examine his throat. Mora told the captain on duty that petitioner had a scratched throat and that he would not be placed on the doctor's list. Because respondent Mora refused to put petitioner on the doctor list, he filled out a Health Services Unit slip.

When petitioner awoke on October 19, 2007, his throat was swollen and he could hardly breathe. Petitioner immediately pressed the medical button and the first-shift Sergeant brought him to respondent Amy. Petitioner told Amy that he might have an infection and he asked to be placed on the doctor list so that he could have his throat examined by a doctor and receive medicine to help with the swelling and pain. Amy inspected petitioner's throat and told petitioner that he merely had a scratched throat and that there was nothing that could be done.

After being examined by respondent Amy, petitioner encountered "major" problems with eating food and swallowing fluids. Petitioner filled out another Health Services Unit slip on October 21, 2007, in which he explained the pain he was experiencing. Respondent Cox responded to petitioner on the same day and wrote that nothing more could be done for a scratched throat. Cox never examined petitioner's throat.

Petitioner continued to have a sore and swollen throat for 22 days after swallowing the sharp object. During that time, petitioner wrote a letter to respondent Huibregtse about the lack of treatment he was receiving. Huibregtse responded to petitioner in writing, explaining that petitioner should contact the Health Services Unit regarding medical treatment.

DISCUSSION

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. Further, serious medical needs must be objectively serious. Wynn v. Southward, 251 F.3d 588, 593 (7th Cir. 2001).

“Serious medical needs” include (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 “chronic and substantial pain”; and (3) conditions that have been “diagnosed by a physician as mandating treatment.” Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997) (citation omitted). Petitioner alleges that he swallowed a sharp object that immediately caused his throat to bleed and left him with a swollen and sore throat for 22 days. He does not suggest that the swelling was severe enough to be life-threatening or that the pain was substantial. Considering that the Eighth Amendment does not require that prison officials keep an inmate pain-free or administer the least painful treatment, Snipes, 95 F.3d at 592, I conclude that petitioner’s swollen and sore throat does not qualify as an objectively serious medical need.

Even if petitioner had alleged facts suggesting his sore and swollen throat was a

serious medical need, “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). Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91. Thus, neither incorrect diagnosis nor improper treatment resulting from negligence states an Eighth Amendment claim. Gutierrez, 111 F.3d at 1374. Instead, “deliberate indifference may be inferred [from] a medical professional’s erroneous treatment decision only when the medical professional’s decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.” Estate of Cole v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996). Mere differences of opinion regarding a patient’s appropriate treatment do not show deliberate indifference. Id.; Snipes, 95 F.3d at 591 (decision “whether one course of treatment is preferable to another [is] beyond the [Eighth] Amendment’s purview”).

Petitioner alleges that respondent Mora came to examine him but did not examine his throat. Petitioner showed respondent Mora a bloody towel and told her about having

swallowed a sharp object. Regardless of how petitioner characterizes the encounter, respondent Mora did go to see him and to listen to his explanation regarding his throat injury. Based on her conversation with petitioner, respondent Mora determined that petitioner had a “scratched throat.” Moreover, the next day when respondent Amy examined petitioner’s throat, Amy agreed with respondent Mora that petitioner merely had a scratched throat. Petitioner may disagree with respondent Mora’s diagnosis of his throat injury and it is possible that respondent Mora was even wrong about her diagnosis despite the confirmation of her diagnosis by a second nurse. Nonetheless, such allegations establish that her determination was negligent or at most medical malpractice, neither of which are within the purview of the Eighth Amendment.

Petitioner alleges that respondent Amy did not “properly” examine his throat, and therefore, she was deliberately indifferent to his serious medical needs. According to petitioner’s allegations, the day after swallowing a sharp object, petitioner complained of a swollen throat and respondent Amy responded to petitioner complaints by examining his throat. Her examination led her to agree with respondent Mora’s previous determination that petitioner had a scratched throat. Again, petitioner’s allegation establishes a difference of opinion regarding the diagnosis of his throat injury. Even if respondent Amy did not “properly” examine petitioner’s throat, her error would establish malpractice and not deliberate indifference. With respect to respondent Cox, he relied on petitioner’s description

of his injury in his Health Services Unit requests and respondent Amy's examination of petitioner to determine that petitioner had a scratched throat that did not necessitate medication. Respondent Cox's decision to rely on respondent Amy's examination would at most be a negligent mistake.

Petitioner's allegations make it clear that he believed that he should have received some pain medication for his throat injury. Respondents Mora, Amy and Cox used their professional knowledge to diagnose petitioner with a scratched throat and they determined that such an injury did not necessitate medication. Petitioner's disagreement with respondents' medical decisions establishes a potential claim for medical malpractice, but not a claim for deliberate indifference. Therefore, petitioner has failed to state an Eighth Amendment claim against respondents Mora, Amy and Cox because his allegations establish disagreement with his diagnosis and treatment and not deliberative indifference to a serious medical need.

Turning to respondents Huibregtse and Ray, petitioner has failed to allege their personal involvement in violating petitioner's rights under the Eighth Amendment. It is well established that liability under § 1983 must be based on a respondent's personal involvement in the constitutional violation. *See, e.g., Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995); *Del Raine v. Williford*, 32 F.3d 1024, 1047 (7th Cir. 1994). "A causal connection, or an affirmative link, between the misconduct complained of and the official

sued is necessary.” Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). None of the allegations in the complaint support an inference that respondents Huibregtse or Ray were deliberately indifferent to petitioner’s medical needs. Respondent Ray is not even mentioned in any of petitioner’s allegations. Respondent Huibregtse merely informed petitioner that he needed to speak to the Health Services Unit regarding any medical needs, but he did not make any decisions regarding petitioner’s medical needs. Therefore, petitioner has failed to state a claim against respondents Huibregtse or Ray.

Because I am denying petitioner’s request for leave to proceed in forma pauperis, I will deny his motion for appointment of counsel as moot.

ORDER

IT IS ORDERED that:

1. Petitioner Lervoltis Lockett's request for leave to proceed in forma pauperis on his Eighth Amendment claim for deliberate indifference to a serious medical need is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Green Bay Correctional Institution of that institution’s obligation to deduct payments until

the filing fee has been paid in full.

3. A strike will be recorded against petitioner pursuant to § 1915(g);
4. Petitioner's motion for appointment of counsel, dkt. #3, is DENIED as moot; and
5. The clerk of court is directed to close the file.

Entered this 29th day of October, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge