IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IVAN D. BRUETTE,

OPINION and ORDER

Petitioner,

08-cv-489-bbc

v.

DEBRA TIDQUIST, TAMMY MAASSEN
JODI DOUGHERTY, SGT. HESTEKIND,
C.O. HOLTER, D. FLIEGER, JOHN DOE (HSU)
and JANE DOE (HSU),

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief brought under 42 U.S.C. § 1983. Petitioner Ivan D. Bruette, a prisoner, contends that respondents Debra Tidquist, Tammy Maassen, Jodi Dougherty, Sgt. Hestekind, C.O. Holter, John Doe (HSU) and Jane Doe (HSU) have violated his rights under the Eighth Amendment by delaying or interfering with his medical treatment or medical restrictions and that respondent Flieger denied him access to the courts. Petitioner requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915, and has paid the initial partial filing fee.

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 respondent who by law cannot be sued for money damages. 28 U.S.C. § 1915(e).

Because petitioner alleges facts from which it may be inferred that respondents Tidquist, Hestekind, Holter, John Doe (HSU) and Jane Doe (HSU) were deliberately indifferent to his serious medical needs, he will be granted leave to proceed on his Eighth Amendment claim against these respondents. However, because petitioner has not stated a claim upon which relief may be granted against respondents Flieger or Dougherty, his claims against these respondents will be dismissed. As for respondent Massen, petitioner will be granted leave to proceed against her for the purpose of discovering the identity of the John and Jane Does he has named as defendants. Once he discovers their names, he will be required to amend his complaint to name them as defendants, replacing respondents John Doe (HSU), Jane Doe (HSU) and Tammy Maassen.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

At all times material to this action, petitioner Ivan D. Bruette was a prisoner at the Jackson Correctional Institution in Black River Falls, Wisconsin. He is currently not incarcerated. Respondent Tammy Maassen is the Health Services Unit Manager and respondent Debra Tidquist is a Nurse Practitioner at the Jackson Correctional Institution. Respondents John and Jane Doe are employees in the Health Services Unit at the institution. Respondents Sgt. Hestekind and C.O. Holter are correctional officers and respondent Flieger is the librarian at Jackson Correctional Institution.

In June 2007, petitioner fell off a top bunk bed and sustained a back injury. On January 5, 2008, he fainted after being overcome with severe pain. He was taken to the Black River Memorial Hospital where he was admitted for pain management and other medical issues related to his back injury. While he was in the hospital, petitioner discovered that he had blood in his urine and several tests were performed on him. When he was released from the hospital on January 7, 2008, Dr. Jerome Kitowski recommended a urologist consultation and a neurosurgical consultation for his back pain and prescribed tramadol, flexeril and a walker for petitioner.

On March 21, 2008, petitioner submitted a health service request to be seen for pain in his lower left side, nausea and fatigue. On March 23, 2008, R.N. Peterson told him that he was scheduled to see a nurse practitioner on March 29, 2008, but that he could resubmit

a blue slip if the problem was severe. Because petitioner was not seen by the nurse practitioner on March 29, 2008, he submitted a health service request complaining of throbbing pain. A nurse responded that he had been rescheduled to see the nurse practitioner on April 7, 2008.

On March 31, 2008, petitioner submitted another request to the Health Services Unit, stating that he had a lot of pain on his left side. Health services staff responded that he had an appointment with the nurse practitioner, now set for April 9 instead of April 7, 2008. On April 13, 2008, petitioner submitted another request to the Health Services Unit stating that his lower left side hurt "really bad" and had been bothering him for over a month. Health Services staff responded that he was scheduled for an appointment with a nurse practitioner on April 17, 2008. Because he was not seen on April 17, 2008, petitioner submitted another request to the Health Services Unit on April 20, 2008, stating that he had left lower side pain and blood in his urine and back pain. He received a response from staff at the Health Services Unit that a urinalysis had been done and sent to the local lab and that he had an appointment scheduled for April 28, 2008.

On April 28, 2008, petitioner was seen by respondent Tidquist. Petitioner reported that he was having a lot of pain. She gave him a bottle of milk of magnesia and granted him medical restrictions, including special instructions that he receive assistance carrying meal trays for one year. On May 6, 2008, petitioner submitted a request to the Health Services

Unit, stating he was having back pain, lots of pain on his lower left side and blood in his urine. He asked to see a doctor "even if it has to be Dr. Adler." Health services staff responded that he was scheduled to see a nurse practitioner on May 29, 2008.

On May 7, 2008, petitioner filed an offender complaint against health services unit staff (JCI-2008-13140). On June 2, 2008, his complaint was dismissed by respondent inmate complaint examiner Dougherty. Respondent Dougherty stated:

> According to the above staff and upon review of Inmate Bruette's medical record, HSU received two requests from Inmate Bruette. One was received on 4/14/08 and he was scheduled for an NP appointment on 4/17/08. The second was received on 4/21/08 and he was called to HSU for a UA and scheduled for an NP appointment on 4/28/08.
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> Previously, he was seen by Dr. Adler on 3/5/08. At that time, Inmate Bruette told Dr. Adler he no longer wanted to be seen by him. He declined any further medications Dr. Adler may order for him. He did not want any follow up with Dr. Adler. He was seen by the Nurse Practitioner on 4/7/08 for left lower quadrant and epigastric pain. (Lab work and a follow up were ordered.) (His medical record indicated he was observed lifting weights in recreation the next day, 4/8/08.) He was called to HSU on 4/21/08. A UA was taken and sent to the local lab. He was seen by NP Tidquist again on 4/22/08. (This was scheduled due to the cancellation on 4/17/08) She questioned if the complainant has renal calculi. She requested a Class III for a CT of the abdomen and pelvis. She also ordered Milk of Magnesia. (As this was medically ordered, Inmate Bruette need not be concerned about taking it.) On 4/28/08, Dr. Adler submitted a Class III for a urology consultation, which has been approved and he cancelled the Class III for the CT. He also ordered physical therapy and urine cytology.
>
> I spoke with Inmate Bruette regarding the request he sent on 5/6/08 claiming he was denied a medical appointment. In his request, he stated he wanted a doctor appointment, even if it was Dr. Adler. He was scheduled for an

> appointment with the Nurse Practitioner for 5/29/08. However, Inmate Bruette is advised, if he cannot wait for his appointment, he may submit a request for a sick call appointment and be seen by an RN.
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> While the inmate makes it clear that he is not satisfied with the care offered, the type of specific care or treatment are matters of professional medical judgment. Those judgments have been made as they pertain to the inmate's medical concerns. The ICE is not in a position to question that.

On May 29, 2008, petitioner was not seen by the nurse practitioner. On May 31, 2008, petitioner filed another offender complaint against health services staff (JCI-2008-15302). On June 6, 2008, respondent Dougherty once again addressed petitioner's complaint. This time, she affirmed his complaint because petitioner had had several medical appointments cancelled and rescheduled within the last month.

On June 4, 2008, correctional officers Hestekind and Holter called the Health Services Unit to remove the medical restrictions that required that he be given assistance to carry meal trays. The Jane or John Doe in the Health Services Unit that the correctional officers called rescinded his medical restrictions.

On July 15, 2008, respondent Flieger denied him use of the law library. He filed offender complaint (JCI-2008-19386) against respondent Flieger. After he filed the complaint, he was placed in temporary lock up for having filed the complaint.

OPINION

The Eighth Amendment prohibits prison officials from showing deliberate indifference to prisoners' serious medical needs or suffering. Estelle v. Gamble, 429 U.S. 97, 103 (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 may be inferred that he had a serious medical need and that prison officials were deliberately indifferent to that need. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). "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 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 alleges that he was having significant pain in his lower left side and his back. "Extreme pain" constitutes a serious medical need. Cooper v. Casey, 97 F. 3d 914, 916-17 (7th Cir. 1996).

Deliberate indifference may be evidenced by a respondent's actual intent or reckless disregard for a prisoner's health or safety, and must amount to highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985). In this case,

petitioner contends that from March 2008 through June 2008 he was denied medical treatment for his pain. He alleges that he submitted health services requests and that his scheduled appointments at the Health Services Unit were cancelled and rescheduled. He alleges that he was seen only once by respondent Tidquist on April 28, 2008, when she gave him only milk of magnesia.

Although petitioner was seen by nurse Tidquist once, petitioner's allegations allow an inference to be drawn that he required more treatment than the nurse could or did provide him and that respondents Tidquist and Jane or John Does (HSU) knew it, but nonetheless delayed providing him treatment. At this early stage, it is possible to infer that respondents' failure to respond sooner to petitioner's requests amounts to deliberate indifference to a serious medical need. Therefore, petitioner will be granted leave to proceed in forma pauperis on his Eighth Amendment claim against respondents Tidquist and John and Jane Does (HSU).

Next, petitioner has named Tammy Maassen as a respondent, but has alleged no facts suggesting she was somehow personally involved in the appointment delays or any other violation. Instead, he alleges only that she is the Health Services Unit Manager. Petitioner fails to state a claim against respondent Maassen because only those personally responsible for deprivation of constitutional right may be held liable under § 1983. Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994). However, petitioner has named "Doe"

respondents identified as Health Services Unit staff, so it is appropriate that he has also named as a respondent an official from whom he might be able to discover the names of those Does. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (explaining that a prisoner may name a high-level prison official as a defendant to uncover through discovery the names of persons directly responsible). Thus, petitioner will be granted leave to proceed against respondent Maassen solely for the purpose of determining the identity of the Doe respondents.

Next, petitioner raises an Eighth Amendment claim against inmate complaint examiner Dougherty for denying one inmate complaint he filed and for affirming the second but failing to "enforce" it. In limited circumstances, it is possible to state a claim of deliberate indifference against a complaint examiner who is told of an ongoing medical need and fails to respond accordingly. Greeno v. Daley, 414 F.3d 645, 656 (7th Cir. 2005). Respondent Dougherty's response to petitioner's first inmate complaint shows that she did not have a "sufficiently culpable state of mind" when she denied it. She investigated the complaint and concluded that his appointments had been rescheduled for a number of different reasons, none of which were malicious, and some of which involved medical judgment, which she declined to question. Such an approach does not evidence deliberate indifference to petitioner's medical needs. Id. (no deliberate indifference when complaint examiner "investigated the complaints and referred them to the medical providers who could

be expected to address [the plaintiff's] concerns"); Johnson v. Doughty, 433 F.3d 1001, 1010 (7th Cir. 2006) (no deliberate indifference when complaint examiner "investigated the situation, made sure that the medical staff was monitoring and addressing the problem, and reasonably deferred to the medical professionals' opinions").

In addition, respondent Dougherty did not act with deliberate indifference when she responded to petitioner's second inmate complaint. Instead, she agreed with petitioner and affirmed his complaint. Although petitioner contends that respondent Dougherty failed to enforce her decision to affirm the complaint, there is no suggestion that respondent Dougherty ever discovered that her order was not followed, or any reason to believe that she normally would or could independently monitor her orders. Because respondent Dougherty was not deliberately indifferent when she investigated petitioner's first complaint before denying it and affirming his second complaint, petitioner's claim against respondent Dougherty will be dismissed.

Petitioner claims that respondents Hestekind, Holter and John or Jane Doe (HSU) were deliberately indifferent to his serious medical need when they rescinded his medical restriction to have assistance carrying his meal trays. Respondent Tidquist had given petitioner the medical restriction, which included special instructions that he be given assistance that he carry a meal tray. At this stage, it is possible to infer that respondents Hestekind, Holter and John or Jane Doe (HSU) knew that petitioner needed assistance with

the meal tray for medical reasons and had no good reason to rescind the medical restriction requiring that assistance. It is possible that, by taking away this restriction, respondents knew that they were making petitioner choose between eating and causing injury to himself by carrying the meal tray. Although the facts regarding petitioner's risk of harm in carrying the meal tray or respondents' motives or knowledge may show otherwise at summary judgment or at trial, at this early stage, an inference may be drawn that supports petitioner's claim that respondents Hestekind, Holter and John or Jane Doe (HSU) acted with deliberate indifference when they rescinded his medical restriction. Thus, petitioner will be allowed to proceed on this Eighth Amendment claim against these respondents.

Next, I understand petitioner to be contending that respondent Flieger denied him access to the courts on July 15, 2008 when he denied petitioner the use of the law library. It is well established that prisoners have a Sixth Amendment right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir., 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. 539, 578-80; Procunier v. Martinez, 416 U.S. 396, 419 (1974). However, inmates' right of access to the courts is not unconditional. Green v. Warden, U.S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983). The constitutionally relevant benchmark is "meaningful" access, not total or unlimited access. Bounds v. Smith, 430 U.S. at 823. Meaningful access has been interpreted as having access

to an adequate law library or access to adequate legal representation. Id. at 817.

To state a claim of denial of access to the courts, petitioner must allege facts from which an inference can be drawn that the denial of access caused him an "actual injury," Lewis v. Casey, 518 U.S. 343, 349 (1996), and that injury must be related to a "separate and distinct right to seek judicial relief of some sort." Christopher v. Harbury, 536 U.S. 403, 415 (2002). At a minimum, a complaint alleging a denial of access to the courts must describe an underlying cause of action and how it has been lost or impeded. Id.

Petitioner alleges that he was denied access to the law library on only one occasion by respondent Flieger and alleges no facts from which an inference can be drawn that his denial of access to the library caused him any "actual injury." Therefore, petitioner has not stated a claim that respondent Flieger denied him his Sixth Amendment right of access to the courts.

As a final note, petitioner alleges that he was placed in temporary lock up because he wrote an offender complaint against respondent Flieger. However, he does not allege who placed him in temporary lock-up or name that person as a defendant. Therefore, I conclude he is not pursuing a retaliation claim. Even if he were, this claim has nothing to do with his claim that he was denied medical care and would have to be brought in a suit separate from this one. Fed. R. Civ. P. 20.

ORDER

IT IS ORDERED that

1. Petitioner Ivan D. Bruette's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that:

a. respondents Debra Tidquist and John and Jane Does (HSU) exhibited deliberate indifference to his serious medical needs by delaying his treatment; and

b. respondents Sgt. Hestekind, C.O. Holter and John or Jane Doe (HSU) exhibited deliberate indifference by rescinding his medical restriction for assistance carrying meal trays; and

c. against respondent Tammy Maassen on his claim that unknown Health Services Unit staff described as John and Jane Does (HSU) acted with deliberate indifference by delaying treatment and rescinding his medical request. Once plaintiff learns the name of these individuals, he will have to amend his complaint to name those persons in place of respondents John and Jane Does (HSU) and Tammy Maassen.

2. Petitioner Ivan D. Bruette's request for leave to proceed in forma pauperis is DENIED with respect to his claims that respondent Jodi Dougherty exhibited deliberate indifference to his serious medical needs by failing to respond properly to his inmate complaints and that respondent Flieger denied him access to the courts by denying him

access to the law library for failure to state a claim upon which relief may be granted and his claims against respondents Flieger and Dougherty are DISMISSED.

3. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to respondent or to respondent's attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. 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.

6. Because I have dismissed one or more claims asserted in petitioner's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against petitioner.

7. 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).

Entered this 30th day of September, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge