

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

RICHARD THOMAS SMITH, JR.,

Plaintiff,

v.

OPINION AND ORDER

14-cv-429-wmc

DR. MARTIN, TAMMY MAASSEN,
DEBRA TIDQUIST, NURSE KOJTHORYZ,
and DR. HEFTIEZER,

Defendants.

Plaintiff Richard Thomas Smith, Jr., brings this action under 42 U.S.C. § 1983, alleging that he was denied medical care for pain in his left foot. Smith also requests leave to proceed without prepayment of fees and costs. After considering his request and supporting documentation, the court has determined that Smith qualifies for indigent status for purposes of the federal *in forma pauperis* statute, 28 U.S.C. § 1915. Moreover, Smith has not only made an initial payment toward the full filing fee for this lawsuit, but already filed an amended version of his complaint. Because Smith is incarcerated, the Prison Litigation Reform Act (“PLRA”) nevertheless requires the court to determine whether the proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

In addressing any *pro se* litigant’s pleadings, the court must construe the allegations generously, and hold the complaint “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After examining the amended complaint under this lenient standard, the court will grant Smith leave to proceed with his claims under the Eighth Amendment for reasons set forth briefly below.

ALLEGATIONS OF FACT

Smith alleges, and the court assumes for purposes of this screening order only, the following facts.

Smith is currently confined by the Wisconsin Department of Corrections (“WDOC”) in the Columbia Correctional Institution. At all times pertinent to the complaint, however, he was in custody at the Jackson Correctional Institution (“JCI”), where: Dr. Martin is employed as a physician; Tammy Maassen is the Health Services Unit (“HSU”) manager; Debra Tidquist is a licensed practical nurse; and Ms. Kojthoryz is a registered nurse. Dr. Heftiezer is a medical director employed by WDOC in Madison.

On February 7, 2014, Smith was seen by Dr. Martin for a prostrate exam. During the exam, Smith told Martin that he could not walk with his left heel down on the ground because he was in pain. Smith attributed this pain to plantar fasciitis, which is a disorder that affects the heel and underside of the foot, and told Martin that he had put in several inmate request slips but that the HSU was “not doing anything” to address his complaints of severe pain. Smith then asked for an “ultra sound guided injection” in his left foot, noting that he had received one previously for pain in his right foot in October 2012. Noting that Smith had been prescribed Ibuprofen for pain, Dr. Martin allegedly replied that he had already consulted with HSU staff and they were “not going to do anything more” to help.

Smith reports that he is still in pain and claims that Ibuprofen will lead to other health problems. Smith claims further that he was seen by personnel at the University of Wisconsin (“UW Health”), who presented him with different treatment options, including a “partial plantar fasciectomy” under local anesthesia. After being scheduled for surgery, Smith also claims that defendants cancelled it. Smith argues that each of these refusals to provide

him with medical care for his left foot constitute violations of his rights under the Eighth Amendment.

OPINION

The Eighth Amendment requires the state to “provide medical care for those whom it is punishing by incarceration.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). A prison official inflicts “unnecessary and wanton” pain in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment when his conduct demonstrates deliberate indifference to a prisoner’s serious medical needs. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (quoting *Estelle*, 429 U.S. at 104). 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). To establish under the Eighth Amendment standard, the prisoner must demonstrate that the defendant: (1) was aware of facts from which an inference of an excessive risk to the prisoner’s health or safety could be drawn; and (2) actually drew an inference that such potential for harm existed. *See Farmer v. Brennan*, 511 U.S. 825, 827.

In this case, Smith alleges that Dr. Martin refused to authorize an ultrasound-guided injection in his left foot, treating him with Ibuprofen for pain instead. Smith alleges further that Dr. Martin and the other defendants cancelled surgery on his left foot already scheduled at UW Health. Inferring for pleading purposes that Smith’s foot pain constituted a serious medical need, his allegations are sufficient to state an Eighth Amendment claim against the defendants at this early stage of litigation.

Although Smith’s allegation against the defendants pass muster under the court’s lower standard for screening, he will have to present *admissible* evidence permitting a

reasonable trier of fact to conclude that each of the defendants acted with deliberate indifference to his serious medical need to ultimately be successful on his claim, which is a high standard. Inadvertent error, negligence or even gross negligence are all insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). In particular, it will be Smith's burden to prove: (1) his condition constituted a serious medical need; (2) perhaps even more daunting, that the defendants knew his condition was serious, caused associated pain and suffering, and could be relieved by ultrasound-guided injection or surgery; and (3) deliberately ignored his need for this treatment. Unless obvious to a lay jury, these elements may well require Smith to provide credible, expert testimony from a physician, particularly in the face of medical evidence to the contrary.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Richard Thomas Smith's request for leave to proceed on his Eighth Amendment claim against defendant Drs. Martin and Hoftiezer, Nurses Debra Tidquist and Kojthoryz, and Health Manager Tammy Maassen is GRANTED.
- (2) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendant.
- (3) For the time being, plaintiff must send the defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendant, he should serve the lawyer directly rather than the defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendant or to defendant's attorney.

- (4) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- (5) Plaintiff 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 his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 3rd day of March, 2015.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge