

**IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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| DON LIPPERT, CARL MICHAELS, |) | |
| MICHAEL CLARK, WILLIAM EARL |) | |
| BASSETT, OZELL GRAYER, |) | |
| LEWIS RICE and MILAN MARTIN, |) | Case No. 10-cv-4603 |
| |) | |
| Plaintiffs, |) | The Honorable Ruben Castillo |
| v. |) | |
| |) | |
| SALVADOR GODINEZ, et al., |) | |
| |) | |
| Defendants. |) | |

**DEFENDANTS WEXFORD HEALTH SOURCES, INC. AND
ATHENA ROSSITER'S MOTION TO DISMISS
PLAINTIFF'S THIRD AMENDED COMPLAINT**

Defendants , WEXFORD HEALTH SOURCES, INC. and ATHENA ROSSITER, by their attorneys, Charysh & Schroeder, Ltd., pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for their motion to dismiss the Third Amended Complaint, state as follows:

A. Count I Should be Dismissed Because the Class Plaintiffs Failed to Comply With the Filing Fee and Cost Provisions of the Prisoner Litigation Reform Act

1. In the Third Amended Complaint, six plaintiffs have been added. (See Third Amended Complaint, Docket Entry 146).

2. Count I of the Third Amended Complaint raises a Section 1983 claim for deliberate indifference to the serious medical needs of the seven “class plaintiffs.”

3. It is undisputed that all seven plaintiffs are currently incarcerated within the Illinois Department of Corrections. (Third Amended Complaint, ¶¶ 4-10). Six of the seven plaintiffs have failed to comply with the filing fee and cost provision requirements of the

Prisoner Litigation Reform Act. 28 U.S.C. § 1915(a)(1). On August 10, 2010, plaintiff Don Lippert paid his filing fee in full. (Docket Entry 5). The other six plaintiffs were added to the Third Amended Complaint without payment of the required filing fee and without moving to proceed as plaintiffs *in forma pauperis*.

4. Paragraph 1915(a)(1) of the Prisoner Litigation Reform Act provides that a prisoner may proceed with a lawsuit in federal court without prepayment of fees provided that: (a) the prisoner submits an affidavit that includes a statement of his assets and a confirmation that the prisoner is unable to pay or give security for the filing fee; and (b) the prisoner submits a certified copy of his prison trust fund account statement for a six-month period immediately preceding the filing of the complaint. 28 U.S.C. § 1915(a)(1)-(2).

5. Even if a prisoner complies with the filing requirements above regarding prepayment of filing fees, he is still required to pay the full filing fee. 28 U.S.C. § 1915(b)(1). Once the certified trust fund statement is submitted to the court, the Court must assess and, when funds exist, collect a partial payment for the prisoner's filing fee. The required fee is 20% of the greater of: (a) The average monthly deposits to the prisoner's account, or (b) The average monthly balance in the prisoner's account for the six-month period preceding the filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B).

6. Once the prisoner makes this initial partial payment, he is required to make monthly payments of 20% of the preceding month's income credited to his prison account. 28 U.S.C. § 1915(b)(2).

7. If the prisoner can demonstrate that he has no assets, he can proceed without payment of a filing fee. 28 U.S.C. § 1915(b)(4).

8. If the prisoner-plaintiff claims that he cannot pay a filing fee, a Court may dismiss his complaint upon a finding that his, “allegation of poverty is untrue.” 28 U.S.C. § 1915(e)(2) (A).

9. Here, the “class plaintiffs” have failed to comply with the filing provisions of the Prisoner Litigation Reform Act. Therefore, Count I of the Third Amended Complaint should be dismissed.

B. As to Plaintiff Lippert, Counts I and II Should Be Dismissed Because He Failed to Exhaust His Administrative Remedies Against Defendant Athena Rossiter and Cannot Allege Deliberate Indifference

10. In Count II of the Third Amended Complaint, Plaintiff Lippert alleges that defendant Athena Rossiter, among others, was deliberately indifferent to his serious medical needs. (Third Amended Complaint, ¶¶ 90-105). The pleading alleges Ms. Rossiter was a nurse at Stateville Correctional Center. (Third Amended Complaint, ¶ 7).

11. Specifically, Plaintiff Lippert alleges that on May 1, 2010, he suffered complications from hyperglycemia and was taken to the emergency room of the prison's health care unit, where he received an insulin shot. (Third Amended Complaint, ¶¶ 91-96). He alleges that Dr. Zhang ordered that he receive a second insulin shot following dinner. (Id.). As to Defendant Rossiter, he alleges that she refused to provide him with with the second insulin shot as ordered by Dr. Zhang and refused to test his blood sugar level. (Third Amended Complaint, ¶¶ 96-99). Finally, Plaintiff Lippert alleges that he exhausted all of his administrative remedies prior to filing this lawsuit against Defendant Rossiter. (Third Amended Complaint, ¶ 100).

12. Mr. Lippert attached the underlying grievance as “Exhibit C” to his Third Amended Complaint. That grievance directly contradicts the allegations raised in his Third

Amended Complaint. Because he made the grievance part of his pleadings, this Court should accept the admissions in grievance for purposes of this motion to dismiss. (See Grievance of May 12, 2010, attached as **Exhibit C** to the Third Amended Complaint).

13. Mr. Lippert never named Ms. Rossiter in the underlying grievance. Further, he made the following admissions in that grievance: (a) He was admitted to the infirmary on May 1, 2010, at the orders of Dr. Zhang; (b) While in the infirmary, he was administered insulin; (c) He was informed by Nurse Breske that Dr. Zhang ordered that if his blood sugar levels were normal, he would not receive a second insulin shot; (d) His blood sugar levels were tested following his insulin shot and those tests showed a normal level of 119; (e) He then asked an “infirmary officer” to request from “two unnamed nurses” that he be administered a second insulin shot; and (f) those nurses refused to administer a second insulin shot. (Ex. C Third Amended Complaint; see also footnote 4, where Plaintiff Lippert admits that normal blood sugar levels range from 70 to 180). These admissions by Mr. Lippert directly contradict the allegations in the Third Amended Complaint that Dr. Zhang ordered Defendant Rossiter to provide him with a second insulin shot and refute his allegations of deliberate indifference.

i. Plaintiff Lippert Failed to Exhaust His Administrative Remedies As to Defendant Rossiter, Because He Did Not File a Grievance Against Her

14. Mr. Lippert alleges he exhausted his administrative remedies against all defendants named in Count II of the Third Amended Complaint. However, in the grievance underlying his claim, which he attached to his complaint, he makes no mention of Ms. Rossiter.

15. Exhaustion of available administrative remedies is a mandatory requirement prior to filing a civil rights action under §1983. The Prison Litigation Reform Act of 1995 forbids any

action from being brought by a state prisoner under §1983, “until such administrative remedies as are available are exhausted.” 42 U.S.C. §1997(e)(a).

16. “Exhaustion” means the prisoner must complete the administrative process by following the rules the State of Illinois has established for the grievance process. In order to properly exhaust his administrative remedies, a prisoner must submit complaints and appeals in the place, and at the time, the prison’s administrative rules require. *Pozo v. McCaughy*, 286 F.3d 1022 (7th Cir. 2002).

17. The Illinois Administrative Code provides a detailed process for filing and appealing grievances. That process must be adhered to before an inmate can file a §1983 lawsuit in federal court. 20 Ill. Admin. Code §504.810(b). The code requires the following steps: (a) First, the offender must attempt to resolve all complaints informally through a designated counselor; (b) If the matter cannot be resolved informally, the offender must file a written grievance; (c) The grievance shall be filed within 60 days after the discovery of the incident giving rise to the grievance; (d) The grievance shall contain factual details regarding each aspect of the offender’s complaint, including what happened, when, where, ***and the name of each person who is subject of or who is otherwise involved in the complaint*** (emphasis added); and (e) If the offender is not satisfied with the response to the grievance, he “may appeal in writing to the Director [of the Department of Corrections] within 30 days after the date of the decision” *Id.*, § 504.810, 504.850(a)). As to identifying persons who are the subject of the grievance, the prisoner must, “include as much descriptive information about the individual as possible.” *Id.*

18. Generally, failure to exhaust is an affirmative defense and need not be pled by the plaintiff. *Jones v. Bock*, 127 S.Ct. 910, 166 L.E2d. 798 (2007). However, “there is no question

that exhaustion is mandatory under the PLRA and that un-exhausted claims cannot be brought in court.” *Id.* at 918-19. Further, a complaint may be dismissed when an affirmative defense appears on its face. *Id.* at 920-921. As such, while the plaintiff is not required to plead exhaustion of administrative remedies, if he chooses to do so, he runs the risk of pleading himself out of court.

19. Here, as to Ms. Rossiter, the plaintiff has pled himself out of court. In his grievance, he alleges two discreet events where the medical staff was deliberately indifferent to his medical needs: (a) Prior to his discharge from the Health Care Unit, he was refused a second insulin shot and told by *Nurse Breske* that additional insulin was being withheld because his blood sugar was normal; and (b) Following his discharge and return to his cell house, an unnamed IDOC nurse passing medications told him that she would give him an insulin shot after she passed out medications, but then failed to do so. (Ex. C to Third Amended Complaint).

20. In Count II, Mr. Lippert contradicts his grievance and provides a different account of what occurred. He now claims *Nurse Rossiter* refused him the insulin shot prior to his discharge from the Health Care Unit. (Third Amended Complaint, ¶ 97). He never alleged this in his underlying grievance as required for exhaustion. Mr. Lippert also contradicts his grievance by alleging that Nurse Rossiter, not a nurse employed by IDOC, while distributing medications in his cell house, stated that she would return and check his blood sugar levels. (Third Amended Complaint, ¶ 98). He also never alleged this in his underlying grievance against Nurse Rossiter.

21. The Illinois Administrative Code mandates that an inmate name the persons he is complaining about in his grievance. Because Mr. Lippert never named Ms. Rossiter in his

underlying grievance, and in fact grieved against different individuals, she had no notice of any allegations against her and no opportunity to respond to the allegations raised in the grievance. Accordingly, Mr. Lippert failed to exhaust his administrative remedies as to Ms. Rossiter, and she should be dismissed from Count II of the Third Amended Complaint.

ii. The Admissions in Mr. Lippert's May 1, 2010 Grievance Establish that Ms. Rossiter Was Not Deliberately Indifferent to His Serious Medical Needs

20. Assuming *arguendo* that Plaintiff Lippert properly exhausted his administrative remedies against Ms. Rossiter, which is denied, Count II would still fail because he cannot allege that Ms. Rossiter was deliberately indifferent to his serious medical needs.

21. Under relevant case law, a plaintiff can plead himself out of court by pleading facts that undermine the allegations set forth in his complaint. *See, e.g., Whitlock v. Brown*, 596 F.3d 406, 412 (7th Cir. 2010) (citations omitted) (“A judicial admission trumps evidence. This is the basis of the principle that a plaintiff can plead himself out of court.”).

22. A claim that an inmate’s Eight Amendment rights have been violated based upon a failure to provide proper medical treatment must demonstrate two elements: (a) an objectively serious medical condition; and (b) deliberate indifference by the prison officials to that condition. *Zentmyer v. Kendall County*, 220 F.3d 805, 810 (7th Cir. 2000). To demonstrate deliberate indifference, the plaintiff must show that the defendant acted with a sufficiently culpable state of mind that is more than negligence and approaches intentional wrongdoing. *Johnson v. Snyder*, 444 F.3d 579, 585 (7th Cir. 2006). A difference of opinion regarding a patient’s medical treatment does not give rise to deliberate indifference, nor does negligence constitute deliberate indifference. *Garvin v. Armstrong*, 236 F.3d 896, 898 (7th Cir. 2001).

23. Further, issues of medical judgment, such as whether one course of treatment is preferable to another, are insufficient to state a constitutional claim under the Eighth Amendment. *Snipes v. DeTella*, 95 F.3d 586, 591 (7th Cir. 1996).

24. Here, the admissions in Mr. Lippert's grievance belie the allegations of deliberate indifference he raises in Count II of his Third Amended Complaint. Further, those admissions show that he received adequate medical treatment by the prison nurses, including "the unnamed nurses," for his alleged hyperglycemia. Specifically, Mr. Lippert admitted the following: (a) He was brought to the Health Care Unit when it was determined he was hyperglycemic; (b) He received an insulin shot and was admitted to the infirmary; (c) After his insulin shot, his blood sugar level was tested and found to be normal; (d) The infirmary nurse, Gloria Breske, informed him that he did not need a second insulin shot since his blood sugar was normal; and (e) Nurse Breske informed him that Dr. Zhang was withholding a second insulin shot based on his normal blood sugar levels.

25. These admissions by Mr. Lippert contradict and trump his claim that Ms. Rossiter refused to provide him with an insulin shot ordered by Dr. Zhang. As detailed above, the plaintiff admitted in his grievance that he received an insulin shot at the orders of Dr. Zhang, his blood sugar level returned to normal and he was informed by Nurse Breske that he would receive his next insulin shot in the morning. Based on these admissions, Mr. Lippert cannot establish that Ms. Rossiter was deliberately indifferent to his medical needs. To satisfy the subjective component of the deliberate indifference test, Mr. Lippert must demonstrate that Ms. Rossiter was aware of and consciously disregarded a serious medical need. Here, the admissions attached to the pleadings show that no one, including Ms. Rossiter, disregarded Mr. Lippert's medical needs; rather, he

simply disagrees with the manner in which the care was provided. Such a disagreement cannot form the basis of a deliberate indifference claim.

26. A prisoner is not constitutionally entitled to the medication or treatment of his choice. *Jackson v. Kotter*, 541 F.3d 688, 697 (7th Cir. 2008). Questions of whether certain diagnostic techniques or forms of treatment are warranted are a “classic example of a matter for medical judgment.” *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996), quoting *Estelle v. Gamble*, 429 U.S. At 97. A prisoner is not entitled to unqualified access to health care. *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006). Moreover, an inability to effect a final cure does not necessarily support a finding of deliberate indifference. *Lieberman v. Budz*, No. 00 C 5662, 2010 WL 3522998, *1 (N.D. Ill. Sep. 2, 2010) (Coar, J.), citing *Snipes v. DeTella*, 95 F.3d 586 (7th Cir. 1996).

27. Based on all of the above, Plaintiff Lippert cannot satisfy the subjective standard of the deliberate indifference test as to Ms. Rossiter. Simply put, he is not entitled to the medical care of his choice. The fact that he disagrees with the timing of the medical care provided to him does not support a claim for deliberate indifference. Based on the admissions in his pleading, he has not and cannot allege that Ms. Rossiter acted with deliberate indifference to his medical needs. Because Mr. Lippert cannot state a claim for deliberate indifference, he is not a proper “class plaintiff” for Count I of the Third Amended Complaint. Therefore, these defendants should also be dismissed from Count I.

For all of the foregoing reasons, defendants, WEXFORD HEALTH SOURCES, INC. and ATHENA ROSSITER, respectfully request that this Honorable Court enter an order

dismissing them from the Third Amended Complaint with prejudice, and for such other and further relief as this Court deems just.

Respectfully submitted,

CHARYSH & SCHROEDER, LTD.

/s/ John J. Beribak

CHARYSH & SCHROEDER, LTD.

33 N. Dearborn St., Suite 1300

Chicago, Illinois 60602

(312) 372-8338

Michael J. Charysh (ARDC# 6187455)

John J. Beribak (ARDC # 6269405)

CERTIFICATE OF SERVICE

The undersigned attorney certifies that he served a copy of the foregoing documents on all attorneys of record via electronic notification to EFC participants, and by U.S. Mail to non-EFC participants at their respective addresses by depositing copies of same with proper postage prepaid in the U.S. Mail at 33 North Dearborn Street, Chicago, Illinois, on December 20, 2012.

s/ John J. Beribak