UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DARNELL L. WALKER	:	
	:	PRISONER
v.	:	Case No. 3:06CV165 (SRU)
	:	
STATE OF CONNECTICUT, et al.[1]	:	

RULING AND ORDER

Darnell L. Walker, an inmate currently confined at the Northern Correctional Institution in Somers, Connecticut, brings this civil rights action pro se and in forma pauperis pursuant to 28 U.S.C. §1915. In his amended complaint, Walker alleges that defendant Dr. Wright was deliberately indifferent to his serious medical needs because Dr. Wright caused him to be without stool softener for 24 days. For the reasons that follow, the amended complaint is dismissed.

I. Standard of Review

Walker has met the requirements of 28 U.S.C. § 1915(a) and has been granted leave to proceed in forma pauperis in this action. Pursuant to 28 U.S.C. § 1915(e)(2)(B), "the court shall dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious; . . . fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i) - (iii). Thus, the dismissal of a complaint by a district court under any of the three enumerated sections in 28 U.S.C. § 1915(e)(2)(B) is mandatory rather than discretionary. See Cruz v. Gomez, 202 F.3d

[1] In the original complaint, Walker named as defendants the State of Connecticut, the Department of Corrections, Northern Correctional Institution and Correctional Health Services. On March 15, 2006, the court dismissed the complaint without prejudice because no named defendant was a person within the meaning of 42 U.S.C. § 1983 and afforded Walker an opportunity to file an amended complaint naming proper defendants. On March 30, 2006, Walker filed an amended complaint naming Dr. Wright as the only defendant.

593, 596 (2d Cir. 2000).

"When an in forma pauperis plaintiff raises a cognizable claim, his complaint may not be dismissed sua sponte for frivolousness under § 1915(e)(2)(B)(i) even if the complaint fails to 'flesh out all the required details.'" Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (quoting Benitez, 907 F.2d at 1295).

> An action is "frivolous" when either: (1) "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;" or (2) "the claim is 'based on an indisputably meritless legal theory.'" Nance v. Kelly, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (quoting Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989)). A claim is based on an "indisputably meritless legal theory" when either the claim lacks an arguable basis in law, Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir. 1990) (per curiam), or a dispositive defense clearly exists on the face of the complaint. See Pino v. Ryan, 49 F.3d 51, 53 (2d Cir. 1995).

Livingston, 141 F.3d at 437. The court exercises caution in dismissing a case under section 1915(e) because a claim that the court perceives as likely to be unsuccessful is not necessarily frivolous. See Neitzke v. Williams, 490 U.S. 319, 329 (1989).

A district court must also dismiss a complaint if it fails to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii) ("court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal . . . (ii) fails to state a claim upon which relief may be granted"); Gomez, 202 F.3d at 596 ("Prison Litigation Reform Act . . . which redesignated § 1915(d) as § 1915(e) [] provided that dismissal for failure to state a claim is mandatory"). In reviewing the complaint, the court "accept[s] as true all factual allegations in the complaint" and draws inferences from those allegations in the light most favorable to the plaintiff. Gomez, 202 F.3d at 596 (citing King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999)).

Dismissal of the complaint under 28 U.S.C. § 1915(e)(2)(B)(ii), is only appropriate if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 597 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

In addition, "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim," the court should permit a pro se plaintiff who is proceeding in forma pauperis to file an amended complaint that states a claim upon which relief may be granted. Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

II. Facts

For purposes of evaluating Walker's claim, the court assumes that the following facts, taken from the amended complaint and attached exhibits are true.

On January 3, 2006, Dr. Wright examined Walker in response to Walker's complaints of rectal bleeding and ordered stool softener. Walker did not receive the stool softener until January 27, 2006. While he was waiting, Walker submitted several inmate requests. On January 12, 2006, Walker submitted an inmate request asking about the delay. On January 16, 2006, Walker submitted a second request to Dr. Wright asking him to order the stool softener. Medical staff responded to both requests on January 16, 2006. In response to the first request, a nurse told Walker that Dr. Wright had ordered stool softener on January 3, 2006, but the pharmacy had not yet sent it. The nurse noted that the order had been resubmitted. In response to the second request, a nurse again informed Walker that the order had been re-faxed to the pharmacy.

Walker assumed that a doctor at the University of Connecticut Health Center had refused to fill the order. When he asked Dr. Wright if his assumption was accurate, Dr. Wright admitted

to Walker that he had made a mistake.

III. Discussion

Walker argues that Dr. Wright was deliberately indifferent to his serious medical needs because he failed to ensure that Walker received the stool softener the day after he was examined instead of twenty-four days later.

Deliberate indifference by prison officials to a prisoner's serious medical need constitutes cruel and unusual punishment in violation of the Eighth Amendment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976). To prevail on such a claim, the plaintiff must allege "acts or omissions sufficiently harmful to evidence deliberate indifference" to his serious medical need. Id. at 106. He must show intent to either deny or unreasonably delay access to needed medical care or the wanton infliction of unnecessary pain by prison personnel. See id. at 104-05.

Mere negligence will not support a section 1983 claim; "the Eighth Amendment is not a vehicle for bringing medical malpractice claims, nor a substitute for state tort law." Smith v. Carpenter, 316 F.3d 178, 184 (2d Cir. 2003). Thus, "not every lapse in prison medical care will rise to the level of a constitutional violation," id.; rather, the conduct complained of must "shock the conscience" or constitute a "barbarous act." McCloud v. Delaney, 677 F. Supp. 230, 232 (S.D.N.Y. 1988) (citing United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970)); see also Estelle, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); Tomarkin v. Ward, 534 F. Supp. 1224, 1230 (S.D.N.Y. 1982) (holding that treating physician is liable under the Eighth Amendment only if his conduct is "repugnant to the conscience of mankind.").

Inmates do not have a constitutional right to the treatment of their choice. See Dean v.

Coughlin, 804 F.2d 207, 215 (2d Cir. 1986). Thus, mere disagreement with prison officials about what constitutes appropriate care does not state a claim cognizable under the Eighth Amendment. See Ross v. Kelly, 784 F. Supp. 35, 44 (W.D.N.Y.), aff'd, 970 F.2d 896 (2d Cir.), cert. denied, 506 U.S. 1040 (1992).

There are both subjective and objective components to the deliberate indifference standard. See Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994), cert. denied sub nom. Foote v. Hathaway, 513 U.S. 1154 (1995). The alleged deprivation must be "sufficiently serious" in objective terms. Wilson v. Seiter, 501 U.S. 294, 298 (1991). See also Nance v. Kelly, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting) ("'serious medical need' requirement contemplates a condition of urgency, one that may produce death, degeneration, or extreme pain"). The Second Circuit has identified several factors that are highly relevant to the inquiry into the seriousness of a medical condition: "'[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.'" Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) (citation omitted).

In addition to satisfying the objective component of the deliberate indifference standard by demonstrating a serious medical need, the plaintiff also must present evidence that, subjectively, the charged prison official acted with "a sufficiently culpable state of mind." Hathaway, 37 F.3d at 66. "[A] prison official does not act in a deliberately indifferent manner unless that official 'knows and disregards an excessive risk to inmate health or safety; 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 the inference.'" Id. (quoting Farmer v. Brennan, 511

U.S. 825, 837 (1994)).

Claims regarding "disagreements over medications, diagnostic techniques (e.g., the need for X-rays), forms of treatment, or the need for specialists or the timing of their intervention" implicate medical judgment. Sond v. St. Barnabus Hosp. Corr. Health Servs., 151 F. Supp. 2d 303, 312 (S.D.N.Y. 2001). Thus, the claims are at most, negligence claims involving medical malpractice and not the subject of a section 1983 action. See id. (citing Estelle v. Gamble, 429 U.S. 97, 107 (1976)).

Walker alleges that he suffered from a torn rectum that caused pain and rectal bleeding. For purposes of evaluating the claim in the amended complaint, the court assumes that Walker suffered from a serious medical need.

Walker alleges that Dr. Wright accepted responsibility for the delay in his receiving the stool softener. Walker concedes, and his exhibits support, that Dr. Wright did order the stool softener on January 3, 2006. Dr. Wright's only alleged fault is that he failed to follow up on the order. Walker states, at most, a claim of negligence. Dr. Wright's omission does not shock the conscience and is not repugnant to the conscience of mankind. See McCloud, 677 F. Supp. at 232; Tomarkin v. Ward, 534 F. Supp. at 1230. The court concludes that Walker fails to state a claim for deliberate indifference to a serious medical need.

The court can discern no possibility that further amendment of the complaint would state a claim for deliberate indifference to a serious medical need. Thus, the complaint is dismissed. Walker may pursue any negligence claim against Dr. Wright in state court.

IV. Conclusion

The amended complaint is **DISMISSED** pursuant to 28 U.S.C. §1915(e)(2)(B)(ii). The Clerk is directed to enter judgment and close this case.

SO ORDERED this 25th day of April 2006, at Bridgeport, Connecticut.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge