COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0283

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

FREDERICK N. SPENCE,

PLAINTIFF-APPELLANT,

V.

MARIANNE A. COOKE, AL KELM, LORA HALLET, CHARLES MILLER, LT. KUHN AND MICHAEL THURMER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Frederick N. Spence appeals pro se from an order dismissing his action. On appeal he contends that the circuit court erroneously exercised its discretion in denying him appointed counsel and that summary judgment was inappropriate on his 42 U.S.C. § 1983 claim and his claim that he

was subjected to cruel and unusual punishment by the failure to provide him with adequate medical treatment. We affirm the dismissal of the action.

¶2 At times relevant to this appeal, Spence was an inmate at the Kettle Moraine Correctional Institution (KMCI). Respondent Marianne A. Cooke was the warden at KMCI; respondent Al Kelm was KMCI's Health Service Manager; respondent Lora Hallet was the Institution Complaint Investigator; respondents Lieutenant Kuhn and Michael Thurmer were correctional officers at KMCI; and respondent Charles Miller was a Corrections Complaint Examiner with the Wisconsin Department of Justice. The essence of Spence's complaint against these parties is that they disciplined him for his refusal to work because he was suffering from back pain and in retaliation for complaining about his back pain. He also complains that the prison officials subjected him to cruel and unusual punishment by their failure to insure that he received physical therapy instruction as recommended by a treating physician.

¶3 We first address Spence's claim that counsel should have been appointed to represent him in this civil rights action. The appointment of counsel for an indigent prisoner in a civil action is required only where it is shown that the prisoner's incarceration prevents the prisoner from having a meaningful opportunity to be heard in the action. *See* ***Piper v. Popp***, 167 Wis. 2d 633, 638, 482 N.W.2d 353 (1992). "[T]he presumption is that an indigent litigant has no right to appointed counsel in a civil case in the absence of at least a potential deprivation of physical liberty." ***Id.*** at 646. Three elements of due process are to be evaluated in deciding whether the presumption against the appointment of counsel is rebutted: (1) the private interests at stake; (2) the risk that the procedures used will lead to erroneous decisions; and (3) the government's interest at stake. *See* ***id.*** at 647.

¶4 The circuit court did not articulate the ***Piper*** standards in denying Spence's motion for appointed counsel. We may affirm the circuit court's ruling if we can conclude from the record that it was nevertheless correct. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). The private interest in this case is Spence's attempt to recover money damages and the loss of ten days' use of the common areas of the prison. These are not liberty interests and not any more compelling than "those at stake in the every day civil tort actions brought for money damages." ***Piper***, 167 Wis. 2d at 649. Further, the procedure in this case, summary judgment and the submission of briefs and affidavits, was not complex so as to create a risk of an incorrect decision should one party not be represented by counsel. Despite its role as an adversary, the government interest is in having a correct judicial determination. *See* ***id.*** at 650. There is nothing to suggest that Spence's incarceration would result in the deprivation of a meaningful opportunity to be heard. It was not error to deny the appointment of counsel.

¶5 When reviewing the grant of summary judgment, we apply the same standards as the circuit court. *See* ***Williams v. State Farm Fire & Cas. Co.***, 180 Wis. 2d 221, 226, 509 N.W.2d 294 (Ct. App. 1993). The first step requires us to examine the pleadings to determine whether a claim for relief has been stated. *See* ***Crowbridge v. Village of Egg Harbor***, 179 Wis. 2d 565, 568, 508 N.W.2d 15 (Ct. App. 1993). If so, the inquiry shifts to whether any factual issues exist. *See* ***id.*** Summary judgment must be entered if the affidavits and other proofs raise no genuine issue as to any material fact and demonstrate that the moving party is entitled to a judgment as a matter of law. *See* ***id.*** at 568-69.

¶6 Spence tries to fashion a claim under 42 U.S.C. § 1983 based on a disciplinary proceeding which resulted in the loss of ten days' use of the common areas. However, he fails to address the means of determining whether a prisoner

held a liberty interest as set forth in ***Sandin v. Conner***, 515 U.S. 472 (1995). The ***Sandin*** Court found that a state prisoner was not deprived of a liberty interest by being placed in segregated confinement for thirty days after being found guilty of misconduct. *See* ***id.*** at 486. The discipline imposed did not present "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." ***Id.*** at 484. *See* ***Chaney v. Renteria***, 203 Wis. 2d 310, 317, 554 N.W.2d 503 (Ct. App. 1996) (the analysis should focus on the physical attributes of what the prisoner was exposed to). Here, Spence only lost the use of common areas and there was no effect on the duration of his sentence. A sufficient liberty interest is not implicated by the disciplinary action so as to support a claim under § 1983. *See* ***Sandin***, 515 U.S. at 487.

¶7 Even if a liberty interest is implicated by the disciplinary action taken, Spence may not rely on the action taken as a basis for damages because he has not been successful in invalidating the disciplinary result. *See* ***Heck v. Humphrey***, 512 U.S. 477, 486-87 (1994). In ***Heck***, the Court held that a condition of maintaining a suit for damages under federal civil rights law for the harm caused by an unlawful conviction or sentence is a showing that the conviction or sentence has been invalidated either by the state court which rendered it or by a federal court in a habeas proceeding. *See* ***id.*** This threshold requirement has been extended to decisions of prison disciplinary committees. *See* ***Stone-Bey v. Barnes***, 120 F.3d 718, 721 (7th Cir. 1997). Spence does not meet this threshold requirement of demonstrating that the disciplinary action against him was unlawful or invalid.

¶8 We turn to Spence's claim that the prison officials violated the Eighth Amendment prohibition against cruel and unusual punishment because they did not provide adequate medical treatment for his back pain. Eighth

Amendment protection extends to the deliberate indifference to a prisoner's serious medical needs. *See* ***Estelle v. Gamble***, 429 U.S. 97, 104 (1976). An objective and subjective component must be satisfied to establish a claim. *See* ***Gutierrez v. Peters***, 111 F.3d 1364, 1369 (7th Cir. 1997). The prisoner must objectively establish a serious medical need. *See* ***id.*** The subjective prong of the analysis requires the prisoner to demonstrate that the prison officials were deliberately indifferent to the prisoner's condition. *See* ***id.***

¶9 It is undisputed that Spence injured his back in February 1995 while he was an inmate at a different correctional facility. He complained from that time of "on-going episodes of back spasms." He contends that as a result of the back spasms, he fell while sweeping sidewalks at KMCI on February 19, 1997. A medical examination conducted on March 27, 1997, assessed Spence to be suffering from chronic low back pain. It is questionable whether such back pain constitutes a serious medical condition because many people suffer from similar ailments without seeking medical treatment. *See* ***Cooper v. Casey***, 97 F.3d 914, 916 (7th Cir. 1996) (the illness or injury should be sufficiently serious or painful to make the refusal of assistance uncivilized and should not be of the sort that people who are not in prison do not seek medical attention for). There is no indication that Spence's condition, if untreated, creates a risk of further injury or the unnecessary infliction of pain. *See* ***Gutierrez***, 111 F.3d at 1373. However, we view the evidence most favorably to Spence, *see* ***Chaney***, 203 Wis. 2d at 312, and will assume that he objectively suffered from a serious medical condition.

¶10 Deliberate indifference by prison officials is more than negligence, gross negligence or recklessness. *See* ***Shockley v. Jones***, 823 F.2d 1068, 1072 (7th Cir. 1987). It is recklessness implying "an act so dangerous that the defendant's knowledge of the risk [of harm resulting from the act] can be

inferred." ***Duckworth v. Franzen***, 780 F.2d 645, 652 (7th Cir. 1985). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the [Eighth Amendment.]" ***Whitley v. Albers***, 475 U.S. 312, 319 (1986).

¶11 Spence complains that x-rays were not taken and he was not given anything to relieve his back pain after his initial fall in February 1995. He also contends that he was not given physical therapy recommended by doctors in December 1996, and again in February 1997. The record shows that Spence was taken to the Rheumatology Clinic at the University of Wisconsin Hospital and Clinics on November 9, 1995; December 12, 1996; February 13 and 28, 1997; and March 27, 1997. Spence was provided the prescription medications recommended by the treating physicians from the clinic. Beginning in 1995, Spence was given instruction on stretching exercises. Physical therapy was recommended after Spence's December 12, 1996 and February 13, 1997 examinations at the clinic. The report from the February 13 visit was received by KMCI on March 14, 1997. An order for physical therapy was entered by the KMCI physician on April 11, 1997. Spence refused physical therapy instruction from a nurse on April 16, 1997.

¶12 We cannot conclude that prison officials acted with deliberate indifference to Spence's medical needs. He was given consultation with specialists, provided all medication that was recommended and offered the opportunity to take the recommended physical therapy. That Spence was unhappy about having a nurse, rather than a doctor, instruct him on physical therapy does not render the care deliberately indifferent. *See* ***Wolff v. McDonnell***, 418 U.S. 539, 562 (1974) (frustration and resentment are commonplace in prison). There was no "obduracy and wantonness" in the treatment provided Spence.

¶13 We do not read Spence's appellate brief to specifically argue that his state law claim of negligence should have survived dismissal by summary judgment. To the extent Spence challenges the dismissal of his state law claim, we adopt the circuit court's well-written decision on why that claim is dismissed. *See* WIS. CT. APP. IOP VI(5)(a) (June 13, 1994) (court of appeals may adopt trial court opinion). Thus, we need not address the respondents' claim that Spence's state law claim is barred by his failure to exhaust his administrative remedies. The action was properly dismissed and we need not address Spence's argument that the respondents are not entitled to qualified immunity.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.