IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RENDELL MILLER,

ORDER

Plaintiff,

08-cv-044-bbc

v.

BURTON COX,

Defendant.

- -

In this case plaintiff Rendell Miller is proceeding on his claim that defendant Burton Cox violated his Eighth Amendment rights by failing to increase the strength of his pain medication and to arrange for x-rays following a fall plaintiff took in the prison shower on July 14, 2007. Now before the court is plaintiff's motion for leave to file an amended complaint, which is accompanied by a proposed amended complaint in which plaintiff seeks to add sixteen new defendants and a new, related claim.

Although leave to amend is given freely when justice so requires, it may be denied where there is evidence of undue delay, bad faith, or undue prejudice or when amendment would be futile. Sound of Music v. Minnesota Mining and Manufacturing Co., 477 F.3d 910, 922-23 (7th Cir. 2007); Fed. R. Civ. P. 15(a). An amendment is futile if the claims

raised in it would have to be dismissed immediately. That is the situation here.

Under the Prison Litigation Reform Act I am required to screen plaintiff's proposed amended complaint, just as I screened his original complaint. 28 U.S.C. § 1915A. From that screening, I conclude that plaintiff cannot proceed against proposed defendants Peter Huibregtse, Randy Williams, Gary Boughton, Shawn Gallinger, Nicholas Furer, Daniel Leffeler, Officer Murray and Officer Govier because his allegations against them suggest at most a claim for negligence with respect to their failure to provide plaintiff with shower shoes, which is a claim that is not actionable under 42 U.S.C. § 1983. Moreover, I conclude that plaintiff cannot proceed against proposed defendants Mary Miller, Jolinda Waterman, Jeanne Larson, Nurse Vicki, Nurse Patti, Nurse Amy, Nurse Mary and Nurse Marriam, because his allegations suggest no more than a mere disagreement with them about the nature of his medical care, rather than deliberate indifference to his serious medical needs. In sum, because I am denying plaintiff's request to replace his original complaint with the proposed amended complaint, his original complaint will remain the operative pleading in the case.

In his proposed amended complaint petitioner alleges the following facts.

FACTUAL ALLEGATIONS

A. Parties

Plaintiff Rendell Miller is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Peter Huibregtse is Warden of the Wisconsin Secure Program Facility. Defendants Randy Williams, Gary Boughton, Shawn Gallinger, Nicholas Furer, Daniel Leffeler, Govier and Murray are all correctional officers at the Wisconsin Secure Program Facility. Defendant Mary Miller is the medical director at the Wisconsin Secure Program Facility. Defendant Burton Cox is a doctor and defendants Jolinda Waterman, Jeanne Larson, Vicki, Patti, Amy, Mary and Marriam are nurses at the Wisconsin Secure Program Facility.

B. Slippery Showers and Shower Shoes

At the Wisconsin Secure Program Facility shower stalls are located in prisoners' cells in Alpha Unit and the shower floors become slippery when wet. Prisoners are normally issued shower shoes when they are held in Alpha Unit cells. Plaintiff was placed in Alpha Unit on June 22, 2007, but was not provided shower shoes.

Plaintiff requested shower shoes from defendants Williams, Furer, Govier, Murray, Gallinger, Leffeler and Boughton but his requests were denied. Defendants Furer, Murray, Govier, Gallinger and Williams would laugh at plaintiff and tell him not to fall while showering. Plaintiff wrote defendant Huibregste to express his fear of slipping in the shower,

but plaintiff received no response. Plaintiff also filed inmate complaints requesting shower shoes.

C. Plaintiff's Slip and Fall

On July 14, 2007, plaintiff slipped and fell while showering. The fall knocked him unconscious. Defendant Furer contacted nurse Valtmann to provide medical assistance to plaintiff. Valtmann examined plaintiff's head and found that he had a large knot on his head and swelling. Valtmann provided plaintiff with an ice pack and Tylenol for the pain.

On July 23, 2007, plaintiff was sent to defendant Cox for an examination in connection with his fall. Defendant Cox determined that plaintiff had suffered a concussion and that the neck and back pain plaintiff was suffering was a result of the fall and hitting his head. Plaintiff complained of "terrible" head, neck and back pain and asked for an x-ray. Defendant Cox stated that there was no need for x-rays.

Plaintiff continued to complain to defendant Cox and defendants Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam about his head, neck and back pain. Plaintiff also explained that the Tylenol provided by the nurses as well as the ibuprofen prescribed by defendant Cox was not alleviating the pain. Between July 2007 and December 2007, plaintiff repeated his complaints of head, neck and back pain as well as requests for x-rays both in person to defendant Cox and through medical requests filed with defendants

Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam. Some of plaintiff's complaints in the form of medical requests were not passed on to defendant Cox; instead, defendants Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam attempted to examine plaintiff and determine how they might help alleviate his pain.

On December 27, 2007, defendant Cox informed plaintiff that he was scheduled for a CT-scan but defendant Cox also explained that there was nothing further he could do to alleviate plaintiff's pain.

DISCUSSION

A. Plaintiff's Claim Regarding the Slippery Shower Floor

The Eighth Amendment imposes duties upon prison officials. Among them is the duty to "take reasonable measures to guarantee" prisoners' safety. Farmer v. Brennan, 511 U.S. 825, 833 (1994). Under the amendment, a prison official may not act with "deliberate indifference" to a prisoner's safety needs. Id. at 834. Plaintiff alleges that defendants Williams, Furer, Govier, Murray, Gallinger, Leffeler, Boughton and Huibregtse violated the amendment by failing to provide him with shower shoes.

In order to state a claim of deliberate indifference to safety under the Eighth Amendment against defendants, plaintiff would have to allege facts suggesting that (1) he faced a substantial risk of serious harm or had a serious medical need and (2) each defendant

knew of that risk, or was aware of facts from which that substantial risk of serious harm could be inferred and drew that inference and (3) defendants disregarded that risk nonetheless. Brown v. Budz, 398 F.3d 904, 913 (7th Cir. 2005) (citing Farmer, 511 U.S. at 838); Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). For defendants to be held liable in a § 1983 action such as this one, their actions must be intentional or criminally reckless because negligence or even gross negligence is not sufficient for liability. Farmer, 511 U.S. at 836-37.

Any rational person is aware that shower floors are slippery when wet and that a slippery floor presents a risk that someone may slip and fall. The question is whether a slippery shower floor presents "an *excessive* risk to inmate health or safety." Farmer, 511 U.S. at 837 (emphasis added). I conclude that it does not.

This conclusion is not a unique one. Several other federal courts have determined that allegations of an Eighth Amendment violation based on a slip and fall on a slippery surface fail to present conditions posing an excessive risk of serious harm. See, e.g., Reynolds v. Powell, 370 F.3d 1028 (10th Cir. 2004) (holding that plaintiff's slip and fall in prison shower did not present Eight Amendment violation); see also Davis v. Corrections Corporation of America, No. 5:07cv279/RS-EMT, 2008 WL 539057, at *3 (N.D. Fla. Feb. 22, 2008) (providing a list of 23 federal court cases in which slip and fall accidents fail to give rise to federal causes of action). Instead, such slip and fall cases provide at most claims

of mere negligence, which are not actionable under 42 U.S.C. § 1983. Snipes v. DeTella, 95 F.3d 586 (7th Cir. 1996). Cases in which courts have found that a slippery surface poses an excessive risk of serious harm usually involve extraneous factors in addition to the slippery surface, such as where prison officials are aware of a prisoner's repeated falls and injuries on a shower floor because of his use of crutches. Frost v. Agnos, 152 F.3d 1124, 1129 (9th Cir. 1998).

Plaintiff does not allege any extraneous factors, such as a medical condition causing him imbalance, that place him at a greater risk of slipping on shower floors than the average person would face when walking on a wet shower floor. Moreover, defendants' failure to provide plaintiff with shower shoes does not make the slippery shower floor an excessive risk to plaintiff's safety. The fact that inmates are normally provided with shower shoes reveals an awareness by prison officials of an ordinary risk of slipping, but it does not reveal an awareness of an excessive risk of slipping.

In sum, although showering without shower shoes required plaintiff to be extra cautious while showering, requiring him to be cautious does not rise to the level of a constitutional claim. See Snipes, 95 F.3d at 592 ("The shower condition he describes may require extra care on his part to keep the toe clean, but such needed precautions do not ignite a constitutional claim."). At most plaintiff has alleged a claim for the common law tort of negligence. Therefore, plaintiff has failed to state a claim upon which relief may be

granted against defendants Williams, Furer, Govier, Murray, Gallinger, Leffeler, Boughton and Huibregtse.

B. Plaintiff's Claim Regarding Medical Treatment

The Eighth Amendment requires also that government officials "'provide medical care for those whom it is punishing by incarceration.'" Snipes, 95 F.3d at 590 (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state such an Eighth Amendment claim plaintiff must allege that prison officials were deliberately indifferent to his serious medical needs. Estelle, 429 U.S. at 106. However, "the Eighth Amendment is not a vehicle for bringing claims for medical malpractice." Snipes, 95 F.3d at 590 (citations omitted). When a prisoner disagrees with a doctor's treatment there is no constitutional claim "unless the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition.'" Id. at 592 (quoting Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974), vacated and remanded on other grounds sub nom. Cannon v. Thomas, 419 U.S. 813 (1974)).

Plaintiff alleges that defendants Cox, Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam were deliberately indifferent to his serious medical needs associated with his slip and fall in the shower. First, I must clear up some seemingly contradictory allegations in plaintiff's amended complaint. Plaintiff alleges that over a five-month period

he continually filed medical requests with defendants Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam, complaining of head, neck and back pain and that those defendants did not pass all such complaints on to defendant Cox, but instead tried to help address plaintiff's pain on their own. However, plaintiff alleges also that defendant Cox received his continued medical requests regarding head, neck and back pain and that he met with and complained to defendant Cox in person over the same five-month period. I interpret plaintiff's amended complaint to be alleging that defendant Cox received some, but not all, medical requests filed by plaintiff between July 2007 and December 2007.

Even assuming that plaintiff has a "serious medical need," his allegations against defendants go no further than allegations of medical malpractice. Although plaintiff believes that stronger doses of pain medication and x-rays would have been the preferred treatment to address his head, neck and back pain, the Constitution does not require defendants to provide plaintiff with the medical treatment he believes to be appropriate; it requires defendants to rely on their medical judgment to provide plaintiff with care that is reasonable in light of their knowledge of his medical problems. See, e.g., Estelle, 429 U.S. at 107 (plaintiff's objection to prison physician's failure to order back x-ray failed to state claim under Eighth Amendment when prison officials provided minimal treatment). In fact, the decision "whether one course of treatment is preferable to another" is "beyond the [Eighth] Amendment's purview." Snipes, 95 F.3d at 591.

Plaintiff alleges that he was examined by a doctor, defendant Cox, and by no less than eight nurses, defendants Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam. Plaintiff alleges as well that after being examined he was provided with Tylenol and ibuprofen. Plaintiff's complaint is that such "basic" pain medication was not adequate to relieve him of pain. However, the Eighth Amendment does not require prison medical officials to keep an inmate pain-free or even to administer the least painful treatment. Snipes, 95 F.3d at 592. Plaintiff's allegations that he received "basic" pain medications establishes that he received at least minimal treatment of his pain, which is what the Constitution requires.

Additionally, the decision by defendants Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam to exercise their medical judgment in some circumstances in an effort to address plaintiff's medical requests without contacting defendant Cox is at most medical malpractice. In light of their knowledge of plaintiff's medical problems, defendants Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam attempted to address his complaints of pain with Tylenol. Plaintiff's allegations establish that defendants Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam did not attempt to address his complaints until after he had been examined by defendant Cox. It is far from blatantly inappropriate for prison nurses to attempt to alleviate a prisoner's pain in accordance with a prison doctor's diagnosis without passing on complaints of the pain to the doctor; this is

even more true when the prisoner's complaints received by the nurses are identical to the complaints that had originally been expressed to the doctor. In fact, although there are limits, nurses are trained to attempt to handle various medical problems without the help of a doctor. Also, the defendant nurses did not ignore plaintiff's medical requests nor did they avoid passing all requests on to defendant Cox. Plaintiff's own allegations show that defendant Cox received at least some of his medical requests regarding his head, neck and back pain.

At most, plaintiff's allegations in his amended complaint at most constitute claims for medical malpractice, not deliberate indifference. Plaintiff's new allegations that he was seen and examined by multiple nurses along with his allegations that defendant Cox used his medical judgment to provide at least a minimum level of treatment for plaintiff's alleged head, neck and back pain have effectively pleaded plaintiff out of court. Therefore, plaintiff's proposed amended complaint fails to state a claim upon which relief may be granted regarding defendants Waterman, Miller, Larson, Vicki, Amy, Mary, Patti and Marriam.

ORDER

IT IS ORDERED that plaintiff Rendell Miller's motion to amend his complaint (dkt. #32) is DENIED because the amendments he wishes to make are immediately vulnerable to dismissal for failure to state a claim upon which relief may be granted, rendering the amendment futile.

Entered this 10th day of June, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge