

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

ROBBE B. MILLER,

Plaintiff,

v.

ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS,
RANDALL HEPP, C. TAYLOR, DR. ADLER,
TAMMY MAASEN, JODI DOUGHERTY, YOLANDA
ST. GERMAINE, DAVID BURNETT, SHARON
ZUNKER, JAMES GREER and KAREN GOULIE,

08-cv-62-bbc

Defendants.

On April 23, 2008, I granted plaintiff leave to proceed in this action against defendant Dr. Adler on a claim that Adler denied plaintiff a cane and is deliberately failing to treat plaintiff's pain, in violation of the Eighth Amendment. In addition, I granted plaintiff leave to proceed on a claim under the Americans with Disabilities Act against the Wisconsin Department of Corrections arising out of his inability to obtain a cane. In the same order, I stayed a decision whether plaintiff could proceed against proposed defendants Randall Hepp, C. Taylor, Tammy Maasen, Jodi Dougherty, Yolanda St. Germaine, David Burnett, Sharon Zunker, James Greer and Karen Goulie, all of whom plaintiff alleges he told

about Dr. Adler's actions and all of whom failed to intervene. With respect to these latter proposed defendants, I told plaintiff that it was not clear from his allegations which of them were "medical professionals" (two are "health services" professionals) or upon what they relied to make their respective decisions. As I explained to plaintiff, these proposed defendants may be held liable only if they knew that defendant Adler was being deliberately indifferent to his serious medical needs and concurred in that decision. I told plaintiff as well that it is not deliberate indifference for a non-medical complaint examiner to reach a decision to deny an inmate complaint in reliance on the opinion of a medical professional whose treatment is the subject of a complaint. Johnson v. Doughty, 433 F.3d 1001, 1010-11 (7th Cir. 2006); Greeno v. Daley, 414 F.3d 645, 656 (7th Cir. 2005). Rather than simply deny plaintiff's request for leave to proceed in forma pauperis on his claims against these proposed defendants, I gave plaintiff until May 5, 2008, in which to submit documentation that would show on what information defendants relied in denying plaintiff's grievances.

Now plaintiff has written to say that he needs more time to submit the required documentation. He says that he has written the "inmate complaint examiner for proof" that he has exhausted his administrative remedies, and has been told that he has completed the exhaustion process for offender complaint 07-28217, concerning the discontinuation of his opiate pain medication, and offender complaint 07-31850, concerning the discontinuation

of his cane.¹ However, plaintiff says he does not have the money at this time to pay for copies of the complete record of his grievances and appeals and the responses he received to them. He asks whether it is a sufficient response to the April 23 order for him to supply general confirmation from an inmate complaint examiner that he has exhausted his administrative remedies with respect to both complaints. It is not.

However, I need not consider whether plaintiff should receive an extension of time within which to submit the requested documentation because, upon further consideration of the allegations in his complaint, I conclude that plaintiff has pled himself out of court on his claim against those proposed defendants who are clearly “non-medical,” that is, persons who reviewed his inmate complaints and appeals. Further, I conclude that plaintiff has alleged the bare minimum to proceed on his Eighth Amendment claim against those proposed defendants whose titles suggest they hold “medical” positions and thus, would be in a position to question Dr. Adler’s decisions if, as plaintiff alleges, those decisions evinced deliberate indifference to his serious medical needs.

¹Plaintiff appears also to be requesting information about two other inmate complaints he filed after he filed his lawsuit in this court: 1) offender complaint #08-7922, concerning the actions of an x-ray technician; and 2) offender complaint #08-9093 or 9039, concerning someone’s refusal to permit him to obtain an MRI. These grievances are unrelated to any claim on which plaintiff has been allowed to proceed in this case. Therefore, he should not submit them in response to this court’s April 23 order.

A. Inmate Complaint Reviewers

In his complaint, plaintiff alleges that defendants Jodi Dougherty and Yolanda St. Germaine are institution complaint examiners, that Karen Gourlie is a Corrections Complaint Examiner and that Randell Hepp and C. Taylor are respectively the warden and deputy warden of the Jackson Correctional Institution, where the events giving rise to plaintiff's claim took place. Each of these individuals plays a role in the administrative grievance process, which is governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner. An institution complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority (usually the warden or deputy warden) that they be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). However, if the institution complaint examiner makes a recommendation that the complaint be granted or dismissed on its merits, the appropriate reviewing authority may dismiss, affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. If an inmate disagrees with the decision of the reviewing authority, he may appeal to a corrections complaint examiner, who is required to conduct additional investigation where appropriate and make a recommendation to the secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within ten working days following receipt

of the corrections complaint examiner's recommendation, the secretary must accept the recommendation in whole or with modifications, reject it and make a new decision or return it for further investigation. Wis. Admin. Code § DOC 310.14.

In his complaint, plaintiff alleges that during the grievance process, respondent Adler made statements to "justify[] his actions," asserting that plaintiff "is able to tie his shoes without any problems, so he does not need pain medication," and "was able to walk to H.S.U. with no problem without his cane." Because the institution complaint examiners, corrections complaint examiner and the warden and deputy warden are not skilled in medicine, they were entitled to defer to defendant Adler's medical opinion regarding plaintiff's grievances. They cannot be held to have acted with deliberate indifference to plaintiff's medical needs when they dismissed his grievances. Therefore, plaintiff will be denied leave to proceed on his claim that defendants Hepp, Taylor, Dougherty, St. Germaine and Goulie were deliberately indifferent to his medical needs in violation of his rights under the Eighth Amendment and ADA.

B. Defendants with Medical Knowledge

At the same time, plaintiff alleges that defendant Tammie Maasen is the Health Services Unit Manager, and that defendants James Greer, David Burnett and Sharon Zunker

work for the Department of Corrections Bureau of Health Services.² Construing the allegations in the complaint in the light most favorable to plaintiff, I may infer from their titles that these defendants have medical expertise and, therefore, would be expected to exercise independent medical judgment in light of plaintiff's complaints about Dr. Adler's alleged improper medical care. Therefore, plaintiff will be allowed to proceed on his claims that defendants Maasen, Greer, Burnett and Zunker were deliberately indifferent to his serious medical needs and violated the ADA by failing to intervene when plaintiff complained to them that defendant Adler was refusing to provide him with a cane or proper treatment for his pain. Plaintiff is advised that as the case moves forward he will be required to show what each of these defendants knew about his medical condition and his treatment in order to prove his claim that each defendant acted with deliberate indifference to his serious medical needs.

²In an untitled document plaintiff filed in response to this court's April 23 order (Dkt. #15), plaintiff states that he made a mistake when he listed James Greer as a Corrections Complaint Examiner. He says that in fact, Greer works for the Department of Corrections Bureau of Health Services. From other lawsuits filed in this court against Greer, I am aware that he is the Director of the Bureau of Health Services. Therefore, I have not listed Greer as a defendant whose role in this case is related to the grievance process.

C. Motion for Appointment of Counsel

Next, in two separate untitled documents (Dkt. ## 13 and 15) plaintiff has asked that the court appoint counsel to represent him in this case. In support of his requests he has provided the names of three lawyers who declined to represent him and two lawyers who failed to respond to his requests for representation. In determining whether it is appropriate to request that a lawyer represent a pro se plaintiff, the court must consider “whether the difficulty of the case—factually and legally—exceeds the particular plaintiff’s capacity as a layperson to coherently present it to the judge or jury himself.” Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007). Plaintiff raises a straightforward Eighth Amendment claim of denial of medical care and a straightforward claim under the Americans with Disabilities Act. At this early stage of the lawsuit, there is nothing in the record to suggest that his case is factually or legally difficult or that he is incapable of gathering and presenting evidence to prove his claims. Therefore, the motion will be denied without prejudice to plaintiff’s renewing his request at a later time.

D. Motion to Amend Complaint

In Dkt. #13, plaintiff asks the court for permission to add facts to his complaint concerning the seriousness of his medical condition and the damages he expects to suffer as a result of his ongoing lack of treatment. Construing this document to include a motion to

amend his complaint, I will deny the motion as unnecessary. Complaints are to be simple, concise and direct, including no more facts than necessary to put the defendants on notice of the claims against them. Fed. R. Civ. P. 8(d); Kolupa v. Roselle Park District, 438 F.3d 713, 715 (7th Cir. 2006). Plaintiff's complaint already meets that standard. He is free to collect evidence to prove the gravity of his situation and the injuries he has suffered and may suffer into the future for use in connection with a motion for preliminary injunctive relief, a motion for summary judgment or at trial. However, his attempt to amend the complaint to add such information is improper. Accordingly, plaintiff's motion to amend his complaint will be denied.

E. Miscellaneous Request

Finally, plaintiff asks that a copy of this court's Procedure To Be Followed On Motions For Injunctive Relief be sent to him. A copy of that document is attached to this order.

ORDER

IT IS ORDERED that:

1. Plaintiff Robbe B. Miller's request to proceed in forma pauperis is GRANTED with respect to his claim that defendants Tammy Maasen, James Greer, David Burnett and

Sharon Zunker exhibited deliberate indifference to his serious medical needs and violated his rights under the ADA by failing to respond to plaintiff's complaints about defendant Adler's refusal to treat his pain and provide him with a cane.

2. Plaintiff's request for leave to proceed in forma pauperis is DENIED with respect to his claim that defendants Randall Hepp, C. Taylor, Jodi Dougherty, Yolanda St. Germaine and Karen Goulie exhibited deliberate indifference to his serious medical needs and violated his rights under the ADA by recommending dismissal or dismissing his inmate complaints about Dr. Adler and this claim is DISMISSED as to these defendants for failure to state a claim upon which relief may be granted.

3. Plaintiff's motions for appointment of counsel (dkt. ## 13 and 15) are DENIED without prejudice.

4. Plaintiff's motion to amend his complaint (dkt. ## 13 and 15) is DENIED.

5. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants; and

6. Because I have dismissed a portion of plaintiff's complaint for one of the reasons

listed in 28 U.S.C. § 1915(g), a strike will be recorded against plaintiff.

Entered this 8th day of May, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge