IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL J. ZUEGE, JR.,

Plaintiff,

v.

DANIEL KNOCH,
ROBERT LAZORIK,
WISCONSIN PATIENT COMPENSATION FUND,
UW HOSPITALS AND CLINICS,
BAUSCH AND LOMB INC
and DOE DEFENDANTS,

Defendants.

OPINION AND ORDER

09-cv-451-slc[1]

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Plaintiff Michael J. Zuege, Jr., a prisoner at the Prairie du Chien Correctional Institution in Prairie du Chien, Wisconsin, has submitted a proposed complaint brought pursuant to 42 U.S.C. § 1983 and state common law. He alleges that defendants either violated his rights under the Eighth Amendment by failing to provide him with adequate medical care, were negligent in their care of him or committed medical malpractice by failing to provide him with proper care. Plaintiff asks for leave to proceed in forma pauperis under

[1] While this court has a judicial vacancy, it is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the purpose of issuing this order only, I am assuming jurisdiction over the case.

28 U.S.C. § 1915 and has paid the initial partial payment required of him. He also requests the appointment of counsel. Dkt. #4.

Because plaintiff is an inmate, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if his complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e). However, plaintiff also is a pro se litigant, which means his complaint will be construed liberally as it is reviewed for these potential defects. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed plaintiff's complaint, I conclude that he may proceed on his Eighth Amendment and state law negligence claims against defendants Danial Knoch and Robert Lazorik. I also will grant him leave to proceed on his state law negligence claims against defendants University of Wisconsin Hospitals and Clinics and Wisconsin Patient Compensation Fund. However, because plaintiff has failed to make any allegations concerning defendants Bausch and Lomb, Inc. and John Does, he will not be allowed to proceed on any claims against them. However, I will allow him until September 4, 2009 to file an amended complaint adding allegations against these defendants. Also, plaintiff's motion for appointment of counsel will be denied without prejudice to his renewing it at some later stage of the proceedings.

The following facts are drawn from the allegations in the complaint.

ALLEGATIONS OF FACT

Plaintiff Michael Zuege, Jr. is incarcerated at the Prairie du Chien Correctional Institution in Prairie du Chien, Wisconsin. Defendants Dr. Daniel Knoch and Robert Lazorik are employed by defendant University of Wisconsin Hospitals and Clinics. Defendant Knoch is an assistant professor in the Department of Opthamology at the hospital.

In April 2007, plaintiff was completing intake for a three-year sentence at Dodge Correctional Institution in Waupun, Wisconsin. While there, he saw Dr. Chan, a prison physician, who told plaintiff that he might have an eye disease for which he would need to see a specialist at the University of Wisconsin Hospital and Clinics in Madison, Wisconsin.

In May 2007, plaintiff was transferred to Oakhill Correctional Institution, where he saw Dr. Zhao. Dr. Zhao told plaintiff that he may have Keratoconus and Fuches Endothelial Dystrophy. In August 2007, plaintiff's vision was 20/100 and he could read and write without visual aids. Later that month, plaintiff was taken to the University of Wisconsin Hospital and Clinics, where he saw defendant Knoch, who diagnosed him with Keratoconus and sent him to be fitted with hard contact lenses. Defendant Knoch referred plaintiff to defendant Lazorik, who performed numerous tests on plaintiff. Defendant Lazorik gave plaintiff a pair of hard contact lenses to wear. The lenses were made by defendant Bausch and Lomb, Inc. Lazorik did not fit plaintiff with the lenses or try other lenses on him.

When plaintiff complained that the lenses were painful, defendant Lazorik said that plaintiff would have to adapt to them.

Between August 2007 and October 2008, plaintiff saw defendants Knoch and Lazorik eight to 10 times. On each occasion, plaintiff complained about how painful the contacts were and that his vision was getting worse. However, defendants Knoch and Lazorik insisted on continuing this course of treatment. During one visit with defendant Knoch, plaintiff and another doctor mentioned Fuches Endothelial Dystrophy. Defendant Knoch told plaintiff that he did not have Fuches.

In October 2008, after plaintiff had been transferred to Prairie du Chien Correctional Institution, plaintiff was seen by prison medical staff. After hearing that plaintiff was in pain, a nurse made plaintiff an appointment with Dr. Donna Higgins. Plaintiff saw Higgins in November 2008. She confirmed plaintiff's Keratoconus diagnosis, told him that the hard contact lenses had permanently warped his corneas and properly fit plaintiff with new lenses. Higgins tested plaintiff and found that his vision was then 20/400 without contacts. She also stated that the lenses prescribed by Knoch and Lazorik did not fit plaintiff correctly, causing him pain and discomfort.

In January 2009, plaintiff saw Higgins again and told her about Dr. Zhao's suspicion that he had Fuches Endothelial Dystrophy. After testing plaintiff, Higgins diagnosed Fuches and prescribed plaintiff eye drops and ointment. Because of the damage to his corneas,

plaintiff's vision has deteriorated to the point where he can no longer read regular-sized print and has had to enroll in the Hadley School for the Blind.

In March 2009, plaintiff filed a notice of claim pursuant to Wis. Stat. § 893.80(1m).

DISCUSSION

A. Eighth Amendment

Plaintiff brings his Eighth Amendment claims pursuant to 42 U.S.C. § 1983. As a preliminary matter, I note that liability under § 1983 attaches to persons who "under color of any statute, ordinance, regulation, custom, or usage" of state power deprive a citizen of any right under the Constitution or federal law. Plaintiff has not alleged specifically that defendants University of Wisconsin Hospital and Clinics, Wisconsin Patient Compensation Fund and Bausch and Lomb, Inc. violated his Eighth Amendment rights, nor could he. Those entities are not "persons" that may be sued under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 66-67 (1989); Witte v.Wisconsin Department of Corrections, 434 F.3d 1031, 1036 (7th Cir. 2006). Further, the doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981).

The Eighth Amendment requires the government "to provide medical care for those whom it is punishing by incarceration." Estelle v. Gamble, 429 U.S. 97, 103 (1976). To

state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that state actors were "deliberately indifferent" to this need. Estelle, 429 U.S. at 104; Garvin v. Armstrong, 236 F.3d 896, 898 (7th Cir. 2001); Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73 (7th Cir. 1997), "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 836 (1994). "Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). Deliberate indifference entails more than "mere negligence," Farmer, 511 U.S. at 836, but requires the prisoner to show that the prison official was aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed to the prisoner's health or safety. Id. at 837; see also Washington v. LaPorte County Sheriff's Department, 306 F.3d 515, 518 (7th Cir. 2002) (inadvertent error, negligence, ordinary malpractice or gross negligence do not constitute deliberate indifference).

Plaintiff alleges that defendants Knoch and Lazorik prescribed contact lenses that

caused him pain and permanent damage to his corneas, ignored his repeated complaints of pain and loss of vision and failed to diagnose an obvious medical condition even though he asked them directly about the condition. Although many of plaintiff's allegations seem to entail negligence on the part of defendants Knoch and Lazorik, plaintiff has alleged sufficient facts from which it can be inferred that they deliberately disregarded an excessive risk that a lack of treatment posed to plaintiff's vision. Therefore, I will grant plaintiff leave to proceed on his Eighth Amendment claim against defendants Knoch and Lazorik.

B. State Law Claims

From plaintiff's complaint, it appears that he intends to allege also that defendants Knoch and Lazorik and their employer, defendant University of Wisconsin Hospital and Clinics, were negligent in caring for him and committed medical malpractice by failing to provide him with proper care. If so, these claims would arise under Wisconsin state law. Generally, federal courts may exercise supplemental jurisdiction over state law causes of action "that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). This means that a federal court can hear both federal and state law claims when the central facts of the federal claim are also the central facts of the state law claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

In this case, plaintiff's medical malpractice claim certainly is intertwined with his claim that defendants Knoch and Lazorik were deliberately indifferent to his need for mental health care. To prevail ultimately on a claim for medical malpractice or negligence in Wisconsin, a plaintiff must prove the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) injury or injuries or damages. Paul v. Skemp, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (2001) (citing Nieuwendorp v. American Family Ins. Co., 191 Wis. 2d 462, 475, 529 N.W.2d 594, 599 (1995)). Therefore, "a claim for medical malpractice requires a negligent act or omission that causes an injury." Id. As discussed above, plaintiff has alleged that defendants Knoch and Lazorik failed to provide him needed treatment for his serious medical needs or to diagnose one of his vision conditions. Although at this early stage, it is impossible to infer whether these failures may have been negligent, plaintiff's allegations are sufficient to state a malpractice claim under Wisconsin law against defendants Knoch and Lazorik.

However, plaintiff faces a problem in suing the University of Wisconsin Hospital and Clinics, a state created-entity. Wis. Stat. § 233.02; Rouse v. Theda Clark Medical Center, Inc., 302 Wis. 2d 358, 377, 735 N.W.2d 30, 39 (2007) (state legislature created University of Wisconsin Hospital and Clinics and intended it to be political corporation under § 893.80). Wis. Stat. § 233.17 limits the hospital's liability in the following manner:

(2) (a) No officer, employee or agent of the board of regents, including any

> student who is enrolled at an institution within the University of Wisconsin System, is an agent of the authority unless the officer, employee or agent acts at the express written direction of the authority.
>
> (b) Notwithstanding par. (a), no member of the faculty or academic staff of the University of Wisconsin System, acting within the scope of his or her employment, may be considered, for liability purposes, as an agent of the authority.

The Wisconsin Court of Appeals has held that a member of the faculty is a *state* employee and thus not an agent of the hospital within the meaning of subsection (2)(b). Suchomel v. University of Wisconsin Hospital and Clinics, 288 Wis. 2d 188, 204, 708 N.W.2d 13, 20-21 (Ct. App. 2005).

Because the complaint establishes that Knoch is a faculty member or academic staff member at the University of Wisconsin and was acting within the scope of his employment when he negligently treated plaintiff, he was not acting as "an agent" of defendant University of Wisconsin Hospital and Clinics. It is unclear what position defendant Lazorik holds at the hospital. Therefore, I am not able to determine whether defendant University of Wisconsin Hospital and Clinics can be held liable for his alleged negligence. However, at this early stage, I will allow plaintiff to proceed on his state law claims against the hospital.

Plaintiff does not make any specific allegations against defendant "Wisconsin Patient Compensation Fund." However, under Wisconsin law, a malpractice plaintiff may recover from the Wisconsin Injured Patients and Families Compensation Fund if the health care

provider or the employee of the health care provider has coverage under the fund, the fund is named as a party in the action and the action against the fund is commenced within the same time limitation within which the action against the health care provider or employee of the health care provider must be commenced. Wis. Stat. § 655.27. Because it appears that plaintiff might be able to recover under this fund, I will allow him to name the fund as a defendant at this time.

Plaintiff will be granted leave to proceed on his state law claims against defendants Knoch, Lazorik, University of Wisconsin Hospital and Clinics and Wisconsin Injured Patients and Families Compensation Fund.

C. Remaining Defendants

Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief," including how the named defendants were involved in the alleged incident or responsible for the alleged wrongdoing. Plaintiff fails to mention how defendants Bausch and Lomb, Inc. and Does were involved in the alleged incident. Therefore, his claims against these defendants do not meet the requirements of Fed. R. Civ. P. 8 and must be dismissed without prejudice. Plaintiff is free to file an amended complaint that clearly identifies each of the defendants and what wrongdoing that they were allegedly involved in or responsible for. If plaintiff chooses to amend his

complaint, he should repeat all of the allegations and claims for relief contained in his original complaint, add any new allegations and highlight those additions by underlining them in the amended complaint.

C. Appointment of Counsel

In deciding whether to appoint counsel, I must first find that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Plaintiff has met this requirement.

The court also must consider whether the plaintiff is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). Plaintiff has done an adequate job of representing himself to this point. His submissions are coherent and articulate. Although he may lack legal knowledge, that is not a good reason to appoint counsel, as this handicap is almost universal among pro se litigants. As this case progresses, plaintiff will improve his knowledge of court procedure. To help him, this court instructs pro se litigants at the preliminary pretrial conference about how to

use discovery techniques available to all litigants so that he can gather the evidence he needs to prove his claim. In addition, pro se litigants are provided a copy of this court's procedures for filing or opposing dispositive motions and for calling witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work.

Finally, this case is too new to allow me to assess plaintiff's abilities or the complexity of his case. Therefore, plaintiff's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

ORDER

IT IS ORDERED that:

1. Plaintiff Michael Zuege Jr.'s request for leave to proceed in forma pauperis is GRANTED with respect to his claims that defendants Daniel Knoch and Robert Lazorik violated his rights under the Eighth Amendment by failing to provide him with adequate medical care, were negligent in their care of him and committed medical malpractice by failing to provide him with proper care.

2. Plaintiff's request to proceed in forma pauperis is GRANTED with respect to his state negligence claims against defendants University of Wisconsin Hospital and Clinics and Wisconsin Injured Patients and Families Compensation Fund.

3. Plaintiff's request for leave to proceed in forma pauperis against defendants

Bausch and Lomb, Inc. and Does is DENIED for plaintiff's failure to comply with Fed. R. Civ. P. 8.

4. Plaintiff may have until September 4, 2009 within which to submit a proposed amended complaint that conforms with the requirements of Rule 8. If plaintiff fails to respond by that date, his claims against defendants Bausch and Lomb, Inc. and Does will be dismissed for plaintiff's failure to prosecute.

5. Plaintiff's motion for appointment of counsel, dkt. #4, is DENIED without prejudice to his renewing it at some later stage of the proceedings.

6. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. Pursuant to an informal service agreement between the Wisconsin Department of Justice 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. Under the agreement, the

Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint for the defendants on whose behalf it accepts service.

Entered this 17th day of August, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge