

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

LONNIE L. JACKSON,

Plaintiff,

v.

DR. PATRICK J. MURPHY, DR. DAVID BURNETT,
WELCOME ROSE, SARA KROPP, RN J. KLETTKE,
SHARON ZUNKER, AMY SMITH, JAMES GREER,
RN WENDY CARIVOU, ISMAEL OZANNE and
HOLLY GUNDERSON,

Defendants.

ORDER

10-cv-425-slc¹

This prisoner civil rights lawsuit was originally part of a larger lawsuit brought under 42 U.S.C. § 1983 in which plaintiff Lonnie Jackson contended that many different prison officials violated his constitutional rights in a variety of ways. This part of the case involved plaintiff's allegations that defendants Dr. Patrick J. Murphy and Wendy Carivou failed to treat plaintiff for his hearing loss, itching and rashes while he was in segregation. In an order entered August 2, 2010, I severed these claims from the original lawsuit because they could

¹ For the purpose of issuing this order, I am assuming jurisdiction over the case.

not be joined to the claims in that case under Fed. R. Civ. P. 20. Dkt. #4. Plaintiff has asked for leave to proceed without prepayment of costs and has made the required initial partial payment in this case, meaning the case is ready to be screened.

Because plaintiff proceeding without prepayment of costs, before he may proceed on his claims the court must screen plaintiff's complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e). Plaintiff's complaint will be construed liberally as it is reviewed for these potential defects because plaintiff is proceeding without a lawyer. Haines v. Kerner, 404 U.S. 519, 521 (1972).

After reviewing plaintiff's complaint, I conclude that he may proceed on his Eighth Amendment claims that (1) defendant David Burnett refused to provide a hearing aid for hearing loss in plaintiff's left ear and Holly Gunderson, Sharon Zunker, Amy Smith and Ismael Ozanne failed to remedy the situation; (2) defendants Patrick Murphy and Wendy Carivou failed to treat plaintiff's hearing loss in his right ear; and (3) defendants Murphy and Carivou failed to treat plaintiff's itching and rashes related to a staph infection and J. Klettke failed to remedy the situation. However, plaintiff's claims against defendants James Greer, Welcome Rose and Sara Kropp will be dismissed because the allegations do not support an inference that any of these defendants were personally involved in any alleged Eighth

Amendment violation.

Before turning to the merits of plaintiff's complaint, I must consider two other motions filed by plaintiff. He asks for leave to file an amended complaint and for appointment of counsel. Plaintiff's proposed amended complaint adds more detail to the claims against defendants Murphy and Carivou and includes new defendants. Because plaintiff's case has yet to be screened, there is no prejudice to his adding new claims and defendants. Moreover, upon review, the added claims and defendants may be joined in the same lawsuit. Thus, I will grant plaintiff's motion for leave to file an amended complaint and accept the proposed amended complaint, dkt. #9, as the operative pleading.

Next, plaintiff asks for appointment of counsel. This is not his first such request; in the original lawsuit, plaintiff's request for appointment of counsel was denied because it was unclear how complex his case would be and he had not given any reason to think he would not be able to handle his case competently. Jackson v. Raemisch, Case No. 10-cv-212-slc, dkt. #7, at 2-3. As I explained to plaintiff, Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007), requires a court to consider both the complexity of the case and the plaintiff's ability to litigate it when deciding whether to appoint counsel. Plaintiff argues that now it is clear that the claims in the case are complex enough to warrant appointment of counsel because they involve complex medical issues. However, plaintiff points to the wrong kind of complexity. This case is complex only in the sense that a layperson may not be able to tell

what medical treatment was necessary and what decisions may have been inappropriate. In other words, plaintiff may require an expert to be able to prove up his claims. Plaintiff has not suggested he would not be able to seek out and retain an expert, but if there is any barrier to his doing so, it is likely the cost of paying the expert. This sort of “complexity” is not a proper basis for appointing counsel; plaintiff is not entitled to counsel merely to avoid the out-of-pocket expenses of a litigation.

Aside from this, plaintiff points out only that a lawyer would be better at handling depositions and accessing records. However, these are problems common to virtually every case in which a litigant is proceeding without a lawyer. Plaintiff does not provide any reason to think that he will not be able to perform the necessary discovery in this case competently, especially once he has been provided with the court’s instructions for handling these matters. He has demonstrated that he understands and can respond properly to the court’s orders and he has show that he is sufficiently articulate to make his concerns known to the court when necessary. Because plaintiff has failed to show that this case is too complex or he is too incapable to litigate this case competently, his motion for appointment of counsel will be denied.

Plaintiff alleges the following in his amended complaint.

ALLEGATIONS OF FACT

On June 7, 2007, plaintiff was tested for loss of hearing in his left ear after he received a head injury during an altercation with staff at the Waupun Correctional Institution. The test results showed that he had hearing loss and might need a hearing aid if it got worse. After that, he was transferred to the Oshkosh Correctional Institution with a recommendation for followup on the hearing loss in his left ear. Defendant Murphy tested plaintiff's left ear and found the results slightly worse than the previous test, so he scheduled an appointment at an outside clinic. The clinic performed the test in August 2007 and later performed an additional test to determine whether the hearing loss might be nerve-related. Afterward, in December 2007, the clinic recommended to Murphy and defendant Burnett that plaintiff receive a hearing aid for his left ear. Murphy agreed with the recommendation and sent a request for approval to Burnett, who did not respond for nearly three months and then denied the request, citing budget concerns and plaintiff's ability to hear with his right ear.

Plaintiff's hearing loss was getting him into trouble with staff because he would not hear their instructions or would talk louder than was appropriate. On May 6, 2008, plaintiff complained about Burnett's denial of a hearing aid. Defendant Gunderson dismissed plaintiff's complaint, using the same rationale as Burnett. Plaintiff appealed and his appeal was dismissed by the regional nurse coordinator and Burnett. Plaintiff also appealed the

decision to defendants Sharon Zunker, Amy Smith and Ismael Ozanne, but each appeal was dismissed. Plaintiff's hearing in his left ear has worsened because nothing was done to correct the problem.

On October 9, 2008, plaintiff was placed in control segregation after he was injured. Plaintiff could not hear in his right ear and tried to tell the housing sergeant that he could not hear and needed to see the nurse. The housing sergeant and Lieutenant Doman told plaintiff that he "had his chance" and declined to take it. Plaintiff told Doman that he never heard anyone ask him whether he wanted to see the nurse before because he could not hear. Plaintiff already had hearing problems in his left ear before his right ear was injured. Doman told plaintiff to put in a Health Services Unit "slip." Plaintiff did, and about 30 minutes later defendant Carivou came to see plaintiff with Doman. She looked at his injured leg, which was bleeding, and his swollen wrist. Plaintiff told Carivou that he could not hear her and needed to see Doctor Murphy, but she simply walked away with Doman. She never examined plaintiff's head or his right ear.

As soon as plaintiff was placed in his cell in the segregation unit, he began to "itch real badly" and shortly afterward broke out in strange rashes that itched severely. He had to wait two days to receive writing supplies to write to the Health Services Unit. On October 10, 2008, plaintiff told sergeant Norman that he needed to see a nurse because he had "severe bruising" on his upper left arm and shoulder area. (Plaintiff later describes it as a "blue

rash.”). Norman called medical staff, but they refused to see plaintiff.

On October 13, 2008, plaintiff submitted another slip, asking to see Dr. Murphy but Murphy refused once again to see plaintiff . Plaintiff asked for treatment for his rash and itching problems again on November 24 and December 4, 2008. On November 24, Carivou refused to treat him because she did not have his chart, but said she would pass it on to another nurse. Even after these additional requests, Murphy did not go to see plaintiff.

On December 8, 2008, plaintiff showed Carivou the rashes again and this time she suggested that plaintiff buy hydrocortisone cream. Plaintiff told Carivou that he wanted to see the doctor before he was released from segregation to determine whether his condition was contagious. Neither Carivou nor Murphy ever provided treatment for the rash or itching. Plaintiff filed a grievance about the matter on December 12, 2008 and defendant J. Klettke dismissed the grievance, noting that plaintiff had received lotion and hydrocortisone.

On December 10 and 11, 2008, plaintiff was seen by a crisis intervention worker, Dr. Warner. Plaintiff said he was concerned that he may have contracted a “staph” infection and showed Warner his cauliflower-like rashes on his stomach and upper arms. Warner told plaintiff that he would get someone down to segregation to look at it and treat it and then went and called the nurse. The nurse came to give plaintiff more hydrocortisone but plaintiff told her that he needed something stronger and needed to be seen by Murphy. The nurse

said she would leave a note for Murphy but never did.

For the rest of December, plaintiff complained “almost every day” about his pain and discomfort and asked to be seen by Murphy, but he never was. Later, plaintiff found out that what he had was a staph infection called “CAMRSA” (community acquired methicillin resistant staphylococcus aureus). That infection brought about folliculitis and plaintiff was finally treated after he was transferred to a different institution. He now has permanent scars on his arms, legs and thigh area from the staph infection. As for plaintiff’s right ear, he had to wait almost a year to receive a hearing aid in the ear. (Plaintiff does not suggest he ever received a hearing aid for his left ear.)

OPINION

Under the Eighth Amendment, a prison official cannot disregard a prisoner’s serious medical need. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). “Serious” medical needs include those that are life-threatening, carry risks of permanent serious impairment if left untreated, result in needless pain and suffering when treatment is withheld, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), “significantly affect[] an individual’s daily activities,” Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), cause pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subject the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). A prison official

is prohibited from acting with “deliberate indifference” to a serious medical need, meaning that if the official is aware that the prisoner needed medical treatment, he or she must take reasonable measures to address it. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). What are “reasonable measures” depends on the context; for instance, if a plaintiff needs medicine, a doctor may need to write the prescription, while a nurse would only have to report to the doctor or administer medicine and a guard might have to do even less, either telling medical staff or making sure the plaintiff is able to tell medical staff himself without unreasonable delay.

Plaintiff identifies three different medical problems he contends were serious medical needs that defendants disregarded: hearing loss in his left ear, hearing loss in his right ear and itching and rashes.

A. Hearing Loss in Left Ear

The first medical problem plaintiff allegedly suffered relates to an injury to his left ear. Plaintiff contends that defendant Burnett acted with deliberate indifference to a serious medical need by refusing to approve a request for a hearing aid for plaintiff’s left ear. It is unclear whether plaintiff’s hearing problem alone could be called a “serious medical need,” but there is evidence to suggest that it might have been. Both the outside clinic and Murphy recommended that he receive a hearing aid, suggesting his hearing problems were sufficiently

serious to be considered a health problem. Cf. Gil v. Reed, 535 F.3d 551, 556 (7th Cir. 2008) (prescription is evidence of serious medical need). Moreover, plaintiff suggests that his lack of a hearing aid may have exacerbated his hearing loss, meaning he faced a risk of permanent impairment if left untreated. Gutierrez, 111 F.3d at 1371-73.

These allegations are sufficient to state a claim against defendant Burnett. The other defendants that plaintiff ties to this claim are defendants Gunderson, Zunker, Smith, Ozanne and Greer. Each is alleged to have refused to provide relief from Burnett's allegedly illegal decision to deny plaintiff a hearing aid. A prison official cannot be held liable under § 1983 unless he or she was personally involved in an alleged violation of constitutional rights, Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995), but this does not mean that liability will attach only to officials directly responsible for medical care. Officials receiving a prisoner's complaint about medical care cannot simply ignore them, Greeno v. Daley, 414 F.3d 645, 656 (7th Cir. 2005) (complaint appeals examiner might be held liable for deliberate indifference if he ignored complaint entirely), although they may be entitled to defer to the judgment of medical officials, id., or even disregard the complaint if there are procedural reasons for doing so. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) (complaint examiner cannot be held liable for rejecting grievance as untimely). In this case, plaintiff alleges sufficient facts to suggest that defendants Gunderson, Zunker, Smith and Ozanne were aware of plaintiff's need for a hearing aid and simply refused to act. It may

turn out that one or more of these defendants are non-medical professionals who decided to dismiss plaintiff's grievance in deference to the decision of a medical professional, or had some other legitimate reason for refusing to act, but at this early stage, all inferences must be drawn in plaintiff's favor. Therefore, he may proceed against these defendants as well.

However, Greer is different. Plaintiff does not include any allegations to support his conclusory statement that Greer "was aware of the situation at all times." Unlike the other defendants, who received complaints, there is no suggestion that Greer ever received information about plaintiff's medical need or Burnett's failure to treat it. Thus, plaintiff's claim against Greer must be dismissed for failure to state a claim upon which relief may be granted. In summary, although plaintiff may not proceed against Greer, he may proceed on his claims that Burnett violated his Eighth Amendment rights by refusing to provide adequate treatment for hearing loss in plaintiff's left ear and defendants Gunderson, Zunker, Smith and Ozanne failed to respond adequately to plaintiff's challenges to his treatment from Burnett.

B. Hearing Loss in Right Ear

Next, plaintiff contends that both Murphy and Carivou failed to address hearing problems he started having with his right ear, which started later, after a separate injury. Again, at this stage, the facts are sufficient to suggest that plaintiff had a serious medical

need (even more so if he could no longer hear well out of either ear). Moreover, the facts allow an inference that both Murphy and Carivou knew about the need for treatment but declined to do anything about it. A failure to act is almost never a “reasonable” response to a serious medical need; therefore, plaintiff states a claim against Murphy and Carivou. Thus, plaintiff may proceed on his claim that Murphy and Carivou failed to adequately treat the hearing problems in plaintiff’s right ear.

C. Itching and Rashes

As with his right ear problems, plaintiff contends that Murphy and Carivou failed to treat his itching and rashes caused by a staph infection. As plaintiff alleges, the failure to treat ultimately resulted in permanent scars, and Murphy provided no care while the most that Carivou did was to provide hydrocortisone, despite plaintiff’s need for antibiotic treatment. These facts are sufficient to allow an inference to be drawn that plaintiff had a serious medical need and that defendants Carivou and Murphy’s failure to treat it amounted to deliberate indifference.

Plaintiff also includes allegations that defendant Klettke received his complaint related to the alleged inadequate treatment he was receiving but Klettke failed to remedy the situation. As mentioned above, it may be that Klettke is a non-medical professional who deferred to the judgment of the nurse or doctor, or there may be some other legitimate

reason why Klettke dismissed plaintiff's complaint. However, at this stage, the allegation suffice to suggest that Klettke knew what was happening and could be found liable for failing to address the problem. Therefore, plaintiff may proceed on his claim that Murphy and Carivou failed to treat the itching and rashes related to a staph infection and Klettke failed to respond appropriately to plaintiff's complaints about their failure to treat him.

D. Remaining Defendants

Plaintiff names Welcome Rose and Sara Kropp as defendants but does not mention them in the body of the complaint. Because he identifies no claims against either of them, he cannot proceed against these defendants.

ORDER

IT IS ORDERED that

1. Plaintiff Lonnie L. Jackson's motion for leave to amend his complaint, dkt. #8, is GRANTED and the proposed amended complaint, dkt. #9, is ADOPTED as the operative pleading.
2. Plaintiff's motion for appointment of counsel, dkt. #7, is DENIED.
3. Plaintiff's request for leave to proceed is GRANTED on his claims that
 - a. defendant David Burnett violated his Eighth Amendment rights by refusing

to provide adequate treatment for hearing loss in plaintiff's left ear and defendants Holly Gunderson, Sharon Zunker, Amy Smith and Ismael Ozanne failed to respond adequately to plaintiff's challenges to his treatment from Burnett;

b. defendants Patrick Murphy and Wendy Carivou failed to adequately treat the hearing problems in plaintiff's right ear; and

c. defendants Murphy and Carivou failed to treat plaintiff's itching and rashes related to a staph infection and J. Klettke failed to respond appropriately to plaintiff's complaints about their failure to treat him.

4. Plaintiff's request for leave to proceed is DENIED with respect his claims against defendants James Greer, Welcome Rose and Sara Kropp and the complaint is DISMISSED with respect to plaintiff's claims against these defendants.

5. 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.

6. 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.

7. Under 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.

8. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Waupun Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 13th day of September, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge