IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DWAYNE ALMOND,

Plaintiff,

v.

WILLIAM POLLARD and MOLLI ROLLI,[1]

Defendants.

OPINION and ORDER

10-cv-621-bbc

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Plaintiff Dwayne Almond, a prisoner at the Green Bay Correctional Institution, has filed an action under 42 U.S.C. § 1983 in which he alleges that he is being denied medication for treatment of serious mental health problems. Because plaintiff alleges that he is in imminent danger of serious physical harm, I construed his complaint as including a motion for preliminary injunctive relief. The parties have completed briefing the motion. After considering the materials submitted by the parties, I will deny plaintiff's motion.

For the sole purpose of deciding plaintiff's motion for a preliminary injunction, I find from the parties' submissions, including plaintiff's medical records, that the following facts are material and undisputed.

[1] I have amended the caption to reflect the proper spelling of defendant Rolli's name.

UNDISPUTED FACTS

Plaintiff Dwayne Almond is a prisoner at the Green Bay Correctional Institution. Some time in the past, plaintiff had been diagnosed with schizoaffective disorder. On January 5, 2010, plaintiff met with Dr. Robert McQueeney, a psychiatrist. Plaintiff requested a prescription for Lorazepam, a drug used in treatment of anxiety and depression. Plaintiff stated that he did not want to take alternative medications Haldol or loxapine. McQueeney explained to plaintiff that a request for Lorazepam would likely be denied because plaintiff has a diagnosis of polysubstance abuse. After meeting with plaintiff, McQueeney stated the following in his psychiatric report:

> The patient's presentation is consistent with a personality disorder. I am aware that WRC had described him having schizoaffective disorder; however, previous diagnoses and workup from other psychiatric professionals documents the patient has an absence of these symptoms and diagnoses. There are psychological tests that have shown the patient to be malingering psychotic symptoms. I do not see the patient as having psychotic symptoms, nor do I see that he is in any acute distress. He does not appear depressed, and he does not appear to be experiencing any anxiety. I believe the symptoms and behavioral presentation the patient is exhibiting are related to his personality disorder. I will be deleting the diagnosis of schizoaffective disorder because I do not believe that is accurate.

Despite this diagnosis, McQueeney placed a Non-Formulary Psychotropic Drug Request for Lorazepam for plaintiff, stating:

> Patient has had multiple trials of medications, he reports the other medications have harmed his insides and have caused impotence. He currently is not taking any psych meds. [The Wisconsin Resource Center] has [diagnosed patient] with schizoaffective disorder. Dr. Knuppel and others have previously documented malingering of psychotic symptoms. Psych testing has shown malingering. [Patient] insists I request [Lorazepam] for him.

Defendant psychiatry director Dr. Molli Rolli reviewed the request made by McQueeney. Defendant Rolli noted that Lorazepam is not recommended for long-term use because such use has not been assessed by systematic studies. Also, Lorazepam is addictive, both physically and psychologically. A patient like plaintiff, with a history of serious substance dependence, is almost never an appropriate candidate for long-term Lorazepam use. From her own professional knowledge of Lorazepam and the information from the January 5, 2010 psychiatric report and the Non-Formulary Psychotropic Drug Request, defendant Rolli reached the opinion that Lorazepam was not a good option for plaintiff.

On February 1, 2011, plaintiff wrote to defendant William Pollard, warden of the Green Bay prison, complaining that prison staff was withholding his legal work and failing to treat his medical and mental health problems. Pollard did not respond.

DISCUSSION

"[T]he granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 389 (7th Cir. 1984). The standard applied to determine whether a plaintiff is entitled to preliminary injunctive relief is well established:

> A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are: 1) whether the plaintiff has a reasonable likelihood of success on the merits; 2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; 3) whether the threatened injury to the plaintiff outweighs the threatened harm an injunction may inflict on defendant; and 4) whether the granting of a preliminary injunction will disserve the public interest.

Pelfresne v. Village of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). At the threshold, plaintiff must show some likelihood of success on the merits and the probability that irreparable harm will result if the requested relief is denied. If plaintiff makes both showings, the court then moves on to balance the relative harms and public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997). Thus, to obtain a preliminary injunction, a movant must first prove that his claim has "at least some merit." Digrugilliers v. Consolidated City of Indianapolis, 506 F.3d 612, 618 (7th Cir. 2007) (citing Cavel International, Inc. v. Madigan, 500 F.3d 544, 547 (7th Cir. 2007)).

After considering the parties' submissions regarding plaintiff's motion for a preliminary injunction, I am persuaded that plaintiff has failed to show even a slight likelihood of success on the merits of his § 1983 claim. Under the Eighth Amendment, a prison official may violate a prisoner's right to medical care if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994).

"Deliberate indifference" means that prison officials know of and disregard an excessive risk to inmate health and safety. Farmer, 511 U.S. at 837. Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. Gutierrez v. Peters, 111 F.3d 1364, 1374 (7th Cir. 1997); Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole, 94 F.3d at 261-62.

At the heart of the matter is plaintiff's belief that he suffers from schizophrenia, versus Dr. McQueeney's professional opinion that plaintiff does not suffer from this mental illness. In deciding not to grant the request for Lorazepam, defendant Rolli relied on McQueeney's opinion as well as other factors, such as plaintiff's substance abuse problems, which made the addictive Lorazepam a poor choice for him. Plaintiff disagrees about whether he has schizophrenia, and notes that he has had a diagnosis of this illness previously, but the fact that McQueeney and Rolli disagree with his prior diagnosis does not sustain a deliberate indifference claim. Gutierrez v. Peters, 111 F.3d at 1374 (7th Cir. 1997). Plaintiff does not

produce any evidence, such as expert testimony, suggesting that Rolli's decision to deny the request for Lorazepam was a "substantial departure from accepted professional judgment." Evidence such as this is necessary if he is to show that defendant Rolli was deliberately indifferent. Estate of Cole, 94 F.3d at 261-62.

As for defendant Warden Pollard, plaintiff states that he wrote to Pollard on February 1, 2011, complaining in part about the lack of mental health treatment, but Pollard did not respond. However, plaintiff does not explain what Warden Pollard was in position to do about McQueeney's or defendant Rolli's treatment decisions. This is not a case in which medical professionals have abandoned their duty to treat a plaintiff; rather, medical professionals considered plaintiff's symptoms and concluded that he does not suffer from schizophrenia. It seems readily apparent that it is not Pollard's job to overturn diagnoses of medical professionals. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) (prison officials "entitled to relegate to the prison's medical staff the provision of good medical care.").

Also, plaintiff argues that defendant Pollard and other prison officials have interfered with his legal materials, but this claim is not part of the present case. The court has received plaintiff's materials in support of his motion for preliminary injunctive relief as well as many other recent filings, so there is no evidence that plaintiff is being restricted from prosecuting this case.

Finally, plaintiff seems to state that he has not received defendants' brief opposing the motion for preliminary injunctive relief or materials supporting that brief. I will attach

a copy of those documents to this order, but I note that this does not affect the denial of his motion because under this court's procedures for briefing motions for injunctive relief, plaintiff was not entitled to reply to defendants' response materials.

ORDER

IT IS ORDERED that plaintiff Dwayne Almond's motion for preliminary injunctive relief, dkt. #17, is DENIED.

Entered this 7th day of April, 2011.

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