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

JEFFREY D. LEISER,

Plaintiff,

v.

BELINDA SCHRUBBE, R.N., *et al.*,

Defendants.

OPINION AND ORDER

11-cv-254-slc

Plaintiff Jeffrey D. Leiser is a state prisoner who is proceeding *pro se* on his Eighth Amendment medical care lawsuit against health care providers and correctional officers at the Waupun Correctional Institution (WCI), where Leiser previously was incarcerated. Leiser claims that the defendants were deliberately indifferent to his chronic lower back pain. The defendants filed a motion for summary judgment on June 22, 2012. Leiser has requested and received an extension of time, up to and including August 6, 2012, in which to reply.

Pending before the court are Leiser's two motions to compel discovery. Dkts. 60 & 62. Defendants oppose both motions. Dkts. 61 & 63. For the reasons stated below, I am granting one part of one motion and denying the remainder of Leiser's requests.

I. Background

Leiser is suing these health care providers and correctional officers at WCI: Health Services Unit Manager Belinda Schrubbe, Dr. Charles Larson, Dr. Debbie Lemke, Dr. Paul Sumnicht, Nurse Mark Jensen, Nurse Sandy Jackson, Cynthia Thorpe, Sergeant Tonia Rozmarynoski (formerly known as Tonia Bristol) and Officer Tammy Giese.

Leiser has a history of chronic low back pain. He had spinal fusion surgery in 1996 and 2002. Leiser contends that from 2005 to 2009, he complained of "severe pain" in his "[c]ervical and [t]horacic and [l]eft [s]houlder," hands and arms. Leiser also has reportedly suffered numbness in his extremities, loss of sleep and recreation time, mental stress, difficulty walking

without a cane, and difficulty sitting or standing for more than 5-10 minutes, among other problems.

Leiser claims that, while he was incarcerated at WCI, Drs. Larson, Lemke and Sumnicht refused to authorize additional surgery for his back and neck issues, which caused his condition to worsen. Leiser also claims that beginning in February of 2007, the defendants wrongfully terminated his prescription for narcotic pain medication. Leiser faults Dr. Sumnicht, in particular, for recommending prayer and meditation to help ease his pain. Leiser contends that Nurse Jensen and Nurse Jackson also failed or refused to treat his complaints of pain. Leiser alleges that he complained about the lack of adequate care to Schrubbe, who serves as the Health Services Unit Manager, but she refused to intervene on his behalf. In addition, Leiser contends that in October 2006, Sergeant Rozmarynoski and Officer Giese frustrated or interfered with his access to narcotic medication or medical treatment. Leiser contends that these acts and omissions by the defendants violated his rights under the Eighth Amendment. The defendants filed a motion for summary judgment on these claims. Leiser then filed two motions to compel.

II. **Motions to Compel Discovery**

In federal court, parties may request discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Fed. R. Civ. P. 26(b)(1). If a party fails to respond to a discovery request, or provides a response that is evasive or incomplete, then the requesting party may move for a court order to compel discovery under Fed. R. Civ. P. 37(a)(1). A federal court has "broad discretion" when deciding whether to compel discovery. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002) (citations omitted). The movant bears the burden of proving that the information sought is relevant to the subject matter of the action.[1]

[1] "Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." F.R. Ev. 401.

See Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, U.A., 657 F.2d 890, 903 (7th Cir. 1981). In the discovery context, relevance is broadly construed to encompass "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 619 (S.D. Ind. 2002) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). Stated another way, "[r]equests for discovery are relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1111 (N.D. Ill. 2004).

III. Eighth Amendment Standard

The subject matter of this case is governed by the Eighth Amendment, which prohibits cruel and unusual punishment. In particular, prison officials have a duty under the Eighth Amendment "'to provide medical care for those whom it is punishing by incarceration.'" *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Prison officials violate the Eighth Amendment if they are "deliberately indifferent" to a prisoner's "serious medical needs." *Arnett v. Webster*, 658 F.3d 742, 750 (7th Cir. 2011) (citing *Estelle*, 429 U.S. at 104).

The Eighth Amendment deliberate indifference standard has both an objective and subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To meet the objective prong of this standard, a prisoner must show that he had "a known, objectively serious medical condition" that posed an excessive risk to his health. *Id*. at 837. A medical condition is serious if it "has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005). With respect to the subjective component, a prison official cannot be found liable under the Eighth Amendment unless the official "knows of and disregards an

excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. In other words, the official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

IV. Leiser's Discovery Requests

A. Disciplinary Records and Inmate Complaints

Leiser seeks all written and electronically stored documents that mention, construe, or reference the disciplinary and employment records for Dr. Larson, Sergeant Rozmarynoski and Officer Giese. Dkt. 60, at ¶¶ 1-13, 27-28. Leiser seeks these records to show that the defendants were "disciplined for misconduct while employed for the [DOC]." Dkt. 60, at ¶ 3. Leiser also requests all inmate complaints filed against Dr. Larson, Sergeant Rozmarynoski, Officer Giese and Dr. Sumnicht. Dkt. 60, at ¶¶ 5, 13-15, 23, 29. Leiser argues that these records will demonstrate that these defendants have a habit of routinely denying inmates medical care with deliberate indifference.

Defendants respond that Leiser's requests are overly broad and not reasonably likely to lead to the discovery of relevant information regarding the narrow issue in this case, which is whether the defendants acted with deliberate indifference to Leiser's need for treatment for back and neck pain. To the extent that his requests are not intended to discover information concerning his particular medical needs, the court agrees that Leiser's request for disciplinary records and grievances is overly broad and not reasonably calculated to lead to the discovery of relevant evidence. *See* Fed. R. Civ. P. 26(b)(1). Leiser does not provide specific facts showing how the defendants' disciplinary records pertain to his particular requests for care. Nor does Leiser explain how grievances filed against the defendants by other inmates could yield information related to his medical needs or the alleged denial of care in his case.

The one arguable exception is if any of these defendants actually had been found to have been deliberately indifferent to an inmate's serious medical needs, in either an administrative or court proceeding. Although "propensity" evidence is not admissible, prior misconduct of the same sort alleged in this lawsuit could be admissible to prove that a defendant acted deliberately rather than accidently or negligently. Accordingly, these defendants must disclose to Leiser any disciplinary proceedings that resulted in a finding that the defendant was deliberately indifferent to an inmate's serious medical needs. In all other respects, this portion of Leiser's motion to compel is denied.

B. Information Related to Dr. Lemke

Leiser requests all documents that mention, construe, or reference a "conference held between Dr. Lemke and the so called committee that determined to take Leiser's Oxycodone from him on [February 15, 2007]." Dkt. 60, at ¶ 16. Leiser also seeks all documents mentioning or referencing a "committee conference" that Dr. Lemke had either on January 26, 2007, February 13, 2007, or February 15, 2007, with the Bureau of Health Services and Dr. Bernet about Leiser's medication. Dkt. 60, at ¶ 18. Leiser asserts that these documents relate to his claim that Dr. Lemke wrongfully discontinued his prescription for narcotic medication. Dkt. 60, at ¶¶ 16-18.

Defendants respond that Dr. Lemke no longer works for the DOC and that he kept no personal files related to inmate medical care. Dkt. 61, at p. 3. Defendants indicate that all such information is in custody of DOC, but that Leiser has "not made any effort" to obtain this information "from the Department itself." *Id.* It is not clear from the defendants' response who within "the Department" has custody of the information requested by Leiser or how he may obtain the documents. Defendants appear not to dispute, however, that the documents are relevant and discoverable in this lawsuit. Therefore, defendants must either provide Leiser with

the requested records or advise Leiser how he may obtain this information within ten days of the date of this order.

C. Information Related to Dr. Sumnicht's Training

Leiser requests documents about Dr. Sumnicht's medical training and practice. Dkt. 60, at ¶ 20. Leiser, who acknowledges that Dr. Sumnicht is "board certified in family practice medicine," requests this information to show that Dr. Sumnicht has no diploma in the field of "faith healing." Dkt. 60, at ¶¶ 21-22. Defendants concede that Dr. Sumnicht is not trained or board certified in the practice of faith healing. Therefore, they have no documents described by this request. Dkt. 61, at pp. 3-4.

"A party need not produce documents or tangible things that are not in existence or within its control." *Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp*., 222 F.R.D. 594, 598 (E.D. Wis. 2004) (citations omitted). In that case, a party may "respond by saying that a document or tangible thing is not in existence." *Id.* Leiser does not show that the requested documents exist, which is perhaps sufficient to prove Leiser's point. Since the court cannot compel the defendants to provide documents that do not exist, Leiser's motion to compel this information must be denied.

D. Information Related to a Non-Party

Leiser requests all documents that mention or refer to "McKesson Co. or Inc." (McKesson) regarding: (1) their guidelines or criteria for offsite visits to medical centers or hospitals for inmates; (2) guidelines for approving surgery; (3) criteria to be met before a "Class I, II, III" medical need is approved for care. Dkt. 62, at ¶¶ 1-3. Leiser believes that this information will show that if an inmate needs treatment or surgery he first has to get approval from McKesson before surgery can be done, which delays care and causes needless pain. Leiser

requests all names of any doctor, nurse practitioner, director, owner, or any other person that has the power to approve or deny any medical treatment request to McKesson. Dkt. 62, at ¶ 5. In addition, Leiser requests all documents that refer to criteria used by McKesson to determine if an inmate needs an MRI. Dkt. 62, at ¶ 12.

Defendants note that these requests concern a non-party and that Leiser does not demonstrate that this entity has any connection with providing care to inmates in DOC, generally, or with his claims, specifically. Dkt. 63, at pp. 1-2. Leiser does not explain what McKesson does and he does not allege facts showing that this entity has any involvement in actually providing medical care to DOC inmates. Absent a showing that the information sought relates to Leiser's claim that he was denied medical care, the court agrees that the requests are not reasonably calculated to lead to the discovery of relevant evidence. *See* Fed. R. Civ. P. 26(b)(1). Leiser's motion to compel these documents is denied.

E. Forms

Leiser requests all documents that mention, construe or refer to forms that must be filled out by doctors at DOC to approve surgery or any other type of medical treatment at an offsite medical care, treatment facility, hospital or clinic. Dkt. 62, at ¶ 4. Defendants object that the request is vague and over broad. I agree. Leiser provides no information explaining how the use of these forms contributed to the denial of care that he outlines in the complaint. Without facts showing how the forms at issue or the process of using the forms relate to any particular treatment sought by Leiser, the request for these documents is vague, overly broad and not reasonably calculated to lead to the discovery of relevant evidence. *See* Fed. R. Civ. P. 26(b)(1). Leiser's motion to compel these documents is denied.

F. Policies and Procedures

Leiser requests all policies and procedures numbered 720 through 721, in place at WCI from 2004 through 2010. Dkt. 62, at ¶ 6. Leiser does not identify the content or purpose of the requested policies and procedures; nor does he attempt to show how they pertain to his claim. Defendants indicate that they would be willing to produce a specific policy if Leiser established its relevance. Dkt. 63, at p. 3. Defendants argue, however, that he has not done so here. I agree with defendants that Leiser must be more specific and must provide more explanation before the court will conclude that a particular policy was relevant to Leiser's alleged denial of care. Because Leiser does not demonstrate how a particular policy or procedure relates to his claim for the denial of medical care, the request for these documents is vague, overly broad and not reasonably calculated to lead to the discovery of admissible evidence. *See* Fed. R. Civ. P. 26(b)(1). Leiser's motion to compel these documents is denied without prejudice to Leiser making a more specific, better supported request.

G. Drug Formularies

Leiser requests all "drug formularies" and all documents referencing the drug formularies used by DOC from 2004 through 2012. Dkt. 62, at ¶ 13. Defendants explain that the drug formulary is a "list of drugs that the DOC pharmacy dispenses." Dkt. 63, at 2. Defendants note that Leiser does not explain why he needs this information and they argue that the request is overly broad. Defendants respond, nevertheless, that they would consider providing the drug formulary for a certain year if Leiser shows its relevance.

Leiser argues that DOC's drug formularies would show what kind of drugs are used in the DOC, but he does not explain why this information is relevant to his claims. There is no dispute over whether DOC had access to medication that might have benefitted Leiser. The dispute is over the defendants' decisions as to which medication to provide Leiser. Therefore, Leiser's

request for drug formularies and related documents is off the mark, overly broad and not reasonably calculated to lead to the discovery of relevant evidence. *See* Fed. R. Civ. P. 26(b)(1). Leiser's motion to compel these documents is denied.

ORDER

It is ORDERED that:

(1) Plaintiff Jeffrey D. Leiser's motion to compel disclosure of any prior administrative or judicial finding that defendant Larson, Rozmarynoski, Giese or Sumnicht. had been deliberately indifferent to an inmate's serious medical need is GRANTED.

(2) Plaintiff Jeffrey D. Leiser's motion to compel disclosure of documents concerning the committee conference by Dr. Lemke, dkt. 60, at ¶¶ 16-18, regarding Leiser's pain medication is GRANTED. Defendants either shall provide Leiser with the requested records or shall advise Leiser how he may obtain this information within ten days of the date of this order.

(3) All other discovery requests listed in Leisers' motions to compel, dkts. 60 & 62, are DENIED.

Entered this 7th day of August, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge