

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

LOREN L. LEISER, SR.,

Plaintiff,

v.

OPINION AND ORDER

11-cv-328-slc¹

JEANNIE ANN VOEKS, R.N., DR. BRIAN J. BOHLMANN,
DR. KENNETH ADLER, DR. BRUCE GERLINGER,
DR. BRAUNSTEIN, DR. JOAN M. HANNULA,
DAVE ROCK, Nurse Practitioner, DR. BURNETT,
REED RICHARDSON, former SCI Security Chief,
PAMELA WALLACE, former SCI Warden,
BRADLEY HOMPE, former SCI Warden,
JEFFREY PUGH, current SCI Warden.
JOHN/JANE DOE(S) "SPECIAL NEEDS COMMITTEE" MEMBERS,
JOHN/JANE DOES(S) "COMMITTEE" APPROVING SURGICAL PROCEDURES,
JAMES GREER, R.N. and
WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN²

Defendants.

Pro se plaintiff Loren Leiser is a prisoner at the Stanley Correctional Institution. He has filed an amended complaint in response to this court's June 9, 2011 order in which I

¹ I am exercising jurisdiction over this case for the purpose of this order.

² I have amended the caption to reflect the changes plaintiff made in his amended complaint.

concluded that many of his allegations failed to provide adequate notice of his claims, as required by Fed. R. Civ. P. 8. In some instances, plaintiff failed to identify how a particular defendant was involved in an alleged constitutional violation. In others, he failed to identify which defendant or defendants he believes is responsible for an alleged constitutional violation. More generally, some allegations did not provide enough context to permit a determination whether plaintiff had stated a claim upon which relief may be granted.

Plaintiff has fixed many of these problems in his amended complaint. The majority of plaintiff's allegations relate to the failure of various prison officials to provide medical care for his knees from 2006 to 2008. He says that he has suffered from knee problems "for decades" because of arthritis and removal of meniscus cartilage. By 2005, he "could barely walk, sleep or eat due to the neverending pain." Am. Cpt. ¶ 25, dkt. #4. He alleges that although multiple doctors concluded that he needed both knees replaced, a number of defendants delayed the surgery unnecessarily and otherwise refused to provide him appropriate treatment. In the meantime, defendants took plaintiff's extra mattress and pillows that he used to cope with his pain. Eventually, plaintiff received surgery for both knees, first on the left knee and then on the right, but not before he endured much suffering.

Although plaintiff has paid the filing fee in full, because he is a prisoner, I must screen the complaint to determine whether it states a claim upon relief may be granted. 28 U.S.C. § 1915A. Having reviewed the complaint, I conclude that plaintiff may proceed on most of

his Eighth Amendment claims arising out of his knee problems. However, I am dismissing plaintiff's claim regarding the "medication delivery system" because he admits he has not exhausted his administrative remedies with respect to that claim. In addition, I am dismissing plaintiff's claims under the Americans with Disabilities Act for his failure to state a claim upon which relief may be granted. Finally, with respect to those claims that are not directly related to plaintiff's knee problems, I am giving plaintiff the choice of prosecuting those claims in separate lawsuits or dismissing them without prejudice to refile them at a later date.

To the extent plaintiff intended to include additional claims other than those discussed in the opinion, I have not considered them because the allegations were too vague or conclusory.

OPINION

A. Eighth Amendment

A prison official may violate a prisoner's right to adequate medical care under the Eighth Amendment 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). The condition does not have to be life threatening. Id. 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 significant 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 the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

- (1) Did plaintiff need medical treatment?
- (2) Did defendants know that plaintiff needed treatment?
- (3) Despite their awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment?

Liberalizing plaintiff's complaint, I conclude that he states a claim under the Eighth Amendment with respect to the following claims:

- In 2005 and 2006, defendant Bruce Gerlinger (a doctor at the Stanley prison) refused to order the following: (1) a "lower tier restriction" for plaintiff so that he would not have to walk up and down stairs; (2) an ambulatory aid, such as a wheel chair, crutch, cane or knee braces; or (3) a portable commode or placement in a handicapped cell (because the toilet in plaintiff's cell was too low for him to use without handrails).
- In 2005 and 2006 Gerlinger failed to provide adequate medication for plaintiff's pain;
- In 2005 and 2006 Gerlinger refused to recommend plaintiff for surgery even though

Gerlinger and an outside doctor concluded that plaintiff needed prosthetic replacement of both knees;

- After plaintiff's surgery on his left knee (plaintiff does not say how this was finally approved or when it occurred, but the order of his allegations suggests that it was some time in 2006), defendant Reed Richardson (the security director) refused to allow plaintiff to participate in physical therapy at the Stanley Hospital;
- In 2007 and 2008, defendants Kenneth Adler, Brian Bohlmann, Dr. Braunstein (all doctors at the Stanley prison), James Greer (a nurse at the prison) and unknown members of the committee approving surgical procedures refused to recommend or approve surgery for plaintiff's right knee;
- In 2007, Adler failed to provide plaintiff adequate pain medication;
- Defendants Joan Hannula (a doctor at the prison), Brad Hompe (the former warden), Jeannie Ann Voeks (the health services unit manager) and unknown members of the "special needs committee" took plaintiff's extra mattress and pillows, which he used to cope with his knee problems;
- After plaintiff's surgery on his right knee, defendant Joan Hannula refused to comply with the hospital's discharge orders regarding his pain medication; both Hannula and Reed refused to comply with discharge orders to give plaintiff a heating pad to help with healing;
- After plaintiff's surgery on his right knee, Hannula failed to provide plaintiff adequate physical therapy;

Plaintiff does not know the names of all of the defendants he is suing, but that is not a reason to dismiss those claims. "[W]hen the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir.1996);

see also Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir.1981) (if prisoner does not know name of defendant, court may allow him to proceed against administrator for purpose of determining defendants' identity). Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff is to amend his complaint to include the unnamed defendants.

At summary judgment or trial, it will not be enough for plaintiff to show that he disagrees with defendants' conclusions about the appropriate treatment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that defendants could have provided better treatment, Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, plaintiff will have to show that any medical judgment by defendants was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir.1996) (internal quotations omitted).

I am not including plaintiff's claim that defendant Voeks does not maintain an adequate "medication delivery system" because plaintiff concedes in his complaint that he has not completed the grievance process on that claim. Although he says that "[e]xhaustion of this issue [is] expected to be completed by time of trial, " Am. Cpt. ¶ 105, dkt. #4, the Court of Appeals for the Seventh Circuit has held that prisoners must finish the exhaustion

process *before* they file their lawsuit. Ford v. Johnson, 362 F.3d 395 (7th Cir. 2004). Although a prisoner's failure to exhaust his administrative remedies is an affirmative defense that normally must be proven by the defendants, a district court may raise an affirmative defense on its own if it is clear from the face of the complaint that the defense applies. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002).

B. Americans with Disabilities Act

In addition to his Eighth Amendment claims, plaintiff includes three claims in his amended complaint under the Americans with Disabilities Act. In the June 9 order, I informed plaintiff that he must include allegations supporting each of the elements of a claim under the ADA: (1) a “physical or mental impairment that substantially limits one or more of the major life activities,” 42 U.S.C. § 12102(2)(A); (2) “the services, programs, or activities” of the prison that are being denied him because of his disability, 42 U.S.C. § 12132, (3) the “reasonable accommodation” he is seeking that a particular defendant has refused to provide. 42 U.S.C. § 12131(2).

Plaintiff says that he is substantially limited in walking and sleeping, both of which are classified as “major life activities” under the ADA. 42 U.S.C. § 12102(2)(A) (“major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning,

reading, concentrating, thinking, communicating, and working”). However, his claims fail on the remaining elements.

With respect to his first claim, he alleges that he is unable to attend “therapeutic rec” because he is a participant in “HSU-PT,” which is another type of rehabilitation program. Because it is his participation in another program rather than a disability that is keeping him out of the program, he does not state a claim under the ADA.

His other two claims are that defendants have denied his request for a double mattress and a plastic chair. It is not enough for plaintiff to identify an accommodation that he believes would help his disability. He must also identify how the mattress and chair would allow him to participate in a particular “program, service or activity” of the prison. Because plaintiff has failed to do this, I cannot let him proceed on these claims.

C. Severance of Unrelated Claims

Plaintiff includes other allegations that seem to have little relationship with his knee problems: (1) defendant Dave Rock, a nurse at the prison, refused to comply with a doctor’s order to give plaintiff physical therapy for his shoulder; (2) defendant Hannula is refusing to treat pain in both of plaintiff’s feet by conducting tests, prescribing special shoes for him or prescribing adequate pain medication ; (3) defendants Voeks and Richardson required him to wear “hard cuffs” instead of “soft cuffs” during transport; and (4) defendant Brian

Bohlmann sexually assaulted him during a medical exam and defendants Dr. Burnett, Pamela Wallace, James Greer, Brad Hompe and Jeffrey Pugh knew that Bohlmann was a danger to prisoners but failed to take reasonable measures to protect them.

Some of these claims might comply with the joinder requirements under Fed. R. Civ. P. 18 and 20 because they are asserted against defendants being sued for failing to treat plaintiff's knee problems as well. However, in light of the absence of a substantial factual overlap large between these claims and the large number of defendants and claims plaintiff is asserting generally, I do not believe that it would be an efficient use of judicial resources to allow all of these claims to proceed as one lawsuit.

When "other issues predominate over the common question, the district judge is entitled to sever the suit or order separate trials." Lee v. Cook County, Illinois, 635 F.3d 969, 971 (7th Cir. 2011) (citing Fed. R. Civ. P. 20(b) and 21). See also Owens v. Hinsley, 635 F.3d 950, 952 (7th Cir. 2011) (courts should use Federal Rules of Civil Procedure "to prevent the sort of morass produced by multi-claim, multi-defendants suits") (internal quotations omitted). Accordingly, I conclude that plaintiff's claims regarding foot pain, shoulder pain, handcuffs and sexual assault belong in four separate lawsuits.

I will stay a decision whether to open new cases until plaintiff informs the court how he wishes to proceed. Plaintiff has several options. He may proceed with each of the four additional claims in four separate lawsuits, dismiss the four claims without prejudice to his

refiling them at a later date or proceed with some of the four claims, but dismiss other claims.

For each additional claim plaintiff chooses to pursue, he will be required to pay a separate filing fee, beginning with an initial partial payment, in accordance with George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). In addition, plaintiff may be subjected to a separate strike for each of the separate lawsuits that he pursues if the lawsuit dismissed for failure to state a claim upon which relief may be granted or because it is legally meritless. As plaintiff may be aware, once a prisoner receives three strikes, he is not able to proceed in new lawsuits without first paying the full filing fee except in very narrow circumstances. 28 U.S.C. § 1915(g).

Alternatively, plaintiff may choose to dismiss any or all of his remaining lawsuits voluntarily. If he chooses this route, he will not owe additional filing fees or face strikes for those lawsuits. Any lawsuit dismissed voluntarily would be dismissed without prejudice, so plaintiff would be able to bring it at another time.

Plaintiff should be aware that because it is not clear at this time which of his separate lawsuits he will pursue, I have not assessed the merits of the claims raised in any of the lawsuits identified above. Once plaintiff identifies the suits he wants to continue to litigate, I will screen the individual actions that remain as required under 28 U.S.C. § 1915(e)(2). Because plaintiff faces filing fees and potential strikes for each lawsuit he pursues, he should

consider carefully the merits and relative importance of each of his potential lawsuits when choosing which of them he wishes to pursue.

ORDER

IT IS ORDERED that

1. Plaintiff Loren L. Leiser is GRANTED leave to proceed on the following claims under plaintiff's Eighth Amendment right to adequate medical care:

- (a) in 2005 and 2006 defendant Bruce Gerlinger refused to order the following: (1) a "lower tier restriction" for plaintiff so that he would not have to walk up and down stairs; (2) an ambulatory aid, such as a wheel chair, crutch, cane or knee braces; or (3) a portable commode or placement in a handicapped cell;
- (b) in 2005 and 2006 Gerlinger failed to provide adequate medication for plaintiff's pain;
- (c) in 2005 and 2006 Gerlinger refused to recommend plaintiff for surgery even though Gerlinger and an outside doctor concluded that plaintiff needed prosthetic replacement of both knees;
- (d) after plaintiff's surgery on his left knee, defendant Reed Richardson refused to allow plaintiff to participate in physical therapy at the Stanley Hospital;
- (e) in 2007 and 2008, defendants Kenneth Adler, Brian Bohlmann, Dr. Braunstein, James Greer and unknown members of the committee approving surgical procedures refused to recommend or approve surgery for plaintiff's right knee;
- (f) in 2007, Adler failed to provide plaintiff adequate pain medication;

- (g) defendants Joan Hannula, Brad Hompe, Jeannie Ann Voeks and unknown members of the “special needs committee” took plaintiff’s extra mattress and pillows, which he used to cope with his knee problems;
- (h) after plaintiff’s surgery on his right knee, defendant Joan Hannula refused to comply with the hospital’s discharge orders regarding his pain medication; both Hannula and Reed refused to comply with discharge orders to give plaintiff a heating pad to help with healing;
- (i) after plaintiff’s surgery on his right knee, Hannula failed to provide plaintiff adequate physical therapy.

2. At the preliminary pretrial conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff is to amend his complaint to include the unnamed defendants.

3. Plaintiff is DENIED leave to proceed on his claim that defendant Voeks does not maintain an adequate “medication delivery system” for plaintiff’s failure to exhaust his administrative remedies. That claim is DISMISSED WITHOUT PREJUDICE to plaintiff’s refiling it in a new lawsuit after he has completed the grievance process.

4. Plaintiff is DENIED leave to proceed on his claims that defendants Voeks and members of the special needs committee have violated his rights under the Americans with Disabilities Act by refusing to allow him to participate in “Therapeutic Rec” and refusing to provide him a double mattress and plastic chair. The complaint is DISMISSED as to these

claims for plaintiff's failure to state a claim upon which relief may be granted.

5. Plaintiff may have until August 5, 2011, to advise the court whether he wishes to go forward with any of the following lawsuits:

- (a) defendant Dave Rock refused to comply with a doctor's order to give plaintiff physical therapy for his shoulder;
- (b) defendant Hannula is refusing to treat pain in both of plaintiff's feet, by conducting tests, prescribing special shoes for him or prescribing adequate pain medication;
- (c) defendants Voeks and Richardson required him to wear "hard cuffs" instead of "soft cuffs" on him during transport; and
- (d) defendant Brian Bohlmann sexually assaulted him during a medical exam and defendants Dr. Burnett, Pamela Wallace, James Greer, Brad Hompe and Jeffrey Pugh knew that Bohlmann was a danger to prisoners but failed to take reasonable measures to protect them.

6. For each lawsuit plaintiff chooses to prosecute, he will owe a separate \$350 filing fee and will be assessed an initial partial payment. Each lawsuit that plaintiff chooses not to prosecute will be dismissed without prejudice to plaintiff's refiling it at a later date.

7. If plaintiff fails to respond to this order by August 5, 2011, I will dismiss the claims listed in paragraph (5) of this order without prejudice to his refiling those lawsuits at a later date.

8. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing

defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

9. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of documents.

10. 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 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 if it accepts service for defendants.

11. Because plaintiff has paid the full filing fee for this case, it is unnecessary for the clerk of court to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 22d day of July, 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge