

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

JOSE R. PADILLA,

Plaintiff,

v.

DR. GARY MAIER, DR. DALIA SULIENE,
DR. KURT SCHWEBKE, J. NICKEL
and C.O. BITTLEMAN,

Defendants.

ORDER

11-cv-425-bbc

In this proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Jose Padilla contends that defendants Gary Maier, Dalia Suliene and Kurt Schwebke violated his rights under the Eighth Amendment and state law by failing to provide him proper health care for his mental and physical needs. Additionally, plaintiff contends that defendant C.O. Bittleman used excessive force against him and that defendant Janel Nickel failed to supervise prison staff and conditions adequately. This case was severed from case number 11-cv-89-bbc, which plaintiff initiated jointly with another prisoner. In that case, I granted plaintiff's motion to proceed under the in forma pauperis statute, 28 U.S.C. § 1915, and plaintiff made an initial partial payment. Because plaintiff's claims were

completely severed from those in the other case in which he is no longer participating, his initial partial payment can be applied to this case.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that 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. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing the complaint, I conclude that plaintiff may proceed on his claims that defendants Maier and Suliene failed to provide him adequate medical care and that defendant Bittleman used excessive force against him. However, plaintiff may not proceed on his claims that defendant Schwebke failed to provide him proper mental health care or that defendant Nickel failed to supervise the prison adequately.

Also before the court is plaintiff's motion for appointment of counsel. Dkt. #2. Because I am not persuaded that appointment of counsel is necessary, I will deny the motion.

In his amended complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

At all times relevant to his complaint, plaintiff was incarcerated at the Columbia Correctional Institution. Plaintiff suffers from mental health problems that cause him to cut himself. Defendant Gary Maier, a psychiatrist at the prison, and defendant Kurt Schwebke, the supervisor of the psychiatric services unit, were aware of plaintiff's mental health problems. In December 2009, Maier met with plaintiff and encouraged plaintiff to cut himself to relieve his anxiety. Plaintiff followed Maier's advice and continued to cut himself, causing himself pain on several occasions.

On October 8, 2010, plaintiff was placed in an observation cell. The cell was one in which inmates serving regular segregation sentences often stayed and had access to their property, including stapled material. Plaintiff found staples in the cell and used them to cut himself. He also pushed the staples into his skin.

Several of the staples were removed surgically, but defendant Dr. Suliene refused to remove one of the staples that was deep in plaintiff's leg, prescribing Tylenol to plaintiff instead. Plaintiff told Suliene that the staple caused him severe pain, but Suliene still refused to remove the staple.

Sometime later, defendant Bittleman, a corrections officer at the prison, came to remove plaintiff from his cell. Bittleman placed restraints on plaintiff and directed plaintiff to kneel so that additional restraints could be placed on him. Plaintiff refused to kneel,

saying that the staple in his leg caused him pain when he knelt down. Bittleman, who knew about the staple in plaintiff's leg from previous interactions with plaintiff, told plaintiff that unless a doctor had placed a medical restriction on plaintiff, plaintiff was required to kneel. Plaintiff continued to refuse and Bittleman "thrash[ed]" plaintiff to the ground forcefully, causing plaintiff severe pain.

DISCUSSION

A. Eighth Amendment Medical Care

Prison officials have a duty under the Eighth Amendment to provide medical care to those being punished by incarceration. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (citing 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 prison officials were "deliberately indifferent" to this need. Estelle, 429 U.S. at 104; 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, "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, 847 (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).

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

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

Plaintiff alleges that he has mental health problems that cause him to cut himself and that he has a staple in his leg that causes him serious pain. I can infer that these problems are serious medical needs that require treatment.

With respect to his mental health needs, plaintiff alleges that defendant Maier knew plaintiff had mental health problems and encouraged plaintiff to cut himself to deal with the problems. These allegations imply that Maier knew plaintiff needed treatment. In addition, I can infer at this stage that Maier’s encouragement to plaintiff to cut himself is not a reasonable response to plaintiff’s mental health issues. Thus, plaintiff may proceed on his Eighth Amendment claim against defendant Maier.

However, plaintiff may not proceed on his claim against defendant Schwebke.

Although Schwebke was aware that plaintiff had mental health problems and was the director of the psychiatric services unit, plaintiff does not allege that Schwebke was involved directly in plaintiff's treatment or allege any facts suggesting that Schwebke was deliberately indifferent to plaintiff's needs. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Additionally, a defendant cannot be held liable for a constitutional violation on the basis of his supervisory status. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Thus, it is not enough to allege that Schwebke is the director of the psychiatric services unit and knew that plaintiff was receiving treatment from psychiatrists in the unit.

With respect to the staple in his leg, plaintiff alleges that defendant Suliene knew that he had a staple in his leg that caused him significant pain and that Suliene refused to take any action to relieve the pain. At this stage, these allegations imply that Suliene was aware of plaintiff's medical needs and failed to take reasonable measures to provide the necessary treatment. Therefore, plaintiff may proceed on his claim against Suliene.

B. Medical Negligence

Plaintiff states that he is also bringing claims against defendants Maier and Suliene for medical negligence in violation of Wisconsin law. Federal courts may exercise

supplemental jurisdiction over a state law claim that is “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). Plaintiff’s medical negligence claims are part of the same case or controversy as his federal claims for violation of his Eighth Amendment rights.

To prevail ultimately on a claim for medical malpractice in Wisconsin, plaintiff must prove that defendants Maier and Suliene breached their duty of care and plaintiff suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865. Plaintiff alleges that defendant Maier failed to provide proper treatment for his mental health problems and defendant Suliene failed to provide treatment for the staple in his leg. At this stage, it is possible to infer that defendants’ actions were negligent. Therefore, plaintiff may proceed on his state medical negligence claims against Maier and Suliene.

C. Excessive Force

Plaintiff contends that defendant Bittleman used excessive force against him in violation of plaintiff’s rights under the Eighth Amendment. To state a claim of excessive force against a prison official, a plaintiff must allege that the official applied force “maliciously and sadistically for the very purpose of causing harm,” rather than “in a good

faith effort to maintain or restore discipline.” Hudson v. McMillian, 503 U.S. 1, 6-7 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). The factors relevant to this determination include such matters as why force was needed, how much force was used, the extent of the injury inflicted, whether defendant perceived a threat to the safety of staff and prisoners and whether efforts were made to temper the severity of the force. Whitley, 475 U.S. at 321.

Plaintiff alleges that even though he was restrained and defendant Bittleman knew that kneeling caused serious pain to plaintiff, Bittleman pushed plaintiff to his knees forcefully in order to put additional restraints on plaintiff. If plaintiff’s allegations are true, he may be able to prove that Bittleman applied force for the sole purpose of harming him. Accordingly, I will allow plaintiff to proceed on his excessive force claim against defendant Bittleman.

D. Defendant Janel Nickel

Plaintiff contends that defendant Nickel, the security director at the Columbia Correctional Institution, violated his constitutional rights by failing to supervise cell conditions and prison staff properly. However, as I explained above, a defendant cannot be held liable under § 1983 on the basis of her supervisory status alone. Plaintiff has alleged no facts suggesting that Nickel was personally involved in the constitutional violations alleged

in this case. Therefore, plaintiff may not proceed on claims against defendant Nickel and she will be dismissed from the case.

E. Motion for Appointment of Counsel

Plaintiff has filed a motion for appointment of counsel, stating that he suffers from mental illnesses, has limited legal knowledge and will not be very good at presenting evidence or cross examining witnesses. He has shown that he made reasonable efforts to find a lawyer by submitting the names and addresses of three lawyers who he asked to represent him on the issues in this case and who turned him down.

Appointment of counsel is appropriate in those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. Pruitt v. Mote, 503 F.3d 647, 645-55 (7th Cir. 2007). Although plaintiff may lack legal knowledge, that is not a sufficient reason to appoint counsel, because this handicap is almost universal among pro se litigants. To help him, this court instructs pro se litigants at a 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, plaintiff will be provided with 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.

As for plaintiff's mental illness, it is too early to tell whether it will overwhelm his ability to litigate this case. He has not yet shown that his mental health problems have affected his litigation skills. As this case progresses, it may become apparent that appointment of counsel is warranted, but for now I will deny his motion. Plaintiff is free to renew his motion at a later date.

ORDER

IT IS ORDERED that

1. Plaintiff Jose Padilla is GRANTED leave to proceed on the following claims:

a. defendants Gary Maier and Dalia Suliene violated plaintiff's rights under the Eighth Amendment and state medical negligence law by failing to provide him adequate medical care; and

b. defendant C.O. Bittleman violation plaintiff's rights under the Eighth Amendment by using excessive force against him.

2. Plaintiff is DENIED leave to proceed on the following claims:

a. defendant Kurt Schwebke violated plaintiff's rights under the Eighth Amendment by failing to provide him adequate mental health care; and

b. defendant Janel Nickel violated plaintiff's constitutional rights by failing to supervise the prison properly.

3. The complaint is DISMISSED as to defendants Schwebke and Nickel.

4. Plaintiff's motion for appointment of counsel, dkt. #2, is DENIED without prejudice to him filing a renewed motion at a later date.

5. 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 if it accepts service on behalf of the state defendants.

6. For the time being, 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.

Entered this 17th day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge