IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARCUSS CHILDS,

ORDER

Plaintiff,

11-cv-500-slc[1]

v.

CYNTHIA M. THORPE, DAVID BURNETT,
KEN ADLER, DALIA SULIENE, JAMES LABELLE,
CARLO GAANAN, LILLIAN TENEBRUSCO,
BELINDA SCHRUBBE, JOHN DOES 1-3,

Defendants.

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In this proposed civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Marcuss Childs, a prisoner at the Waupun Correctional Institution, contends that several defendants employed at the Department of Corrections failed to provide him adequate medical treatment in violation of the Constitution. Plaintiff has filed a supplement to his complaint, dkt. #8, in which he clarifies that he is also bringing state law medical negligence claims against defendants. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

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

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and supplement 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 Cynthia Thorpe, David Burnett, Ken Adler, Dalia Suliene, James LaBelle, Carlo Gaanan, Lillian Tenebrusco, Belinda Schrubbe and John Does 1-3 violated his rights under the Eighth Amendment and state law by failing to provide him adequate medical care for his hernia. However, I will deny plaintiff's motion for appointment of counsel to represent him in this case. Plaintiff has not shown that counsel is necessary.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

In 2003, plaintiff had a reducible hernia diagnosed in his right-side groin area. In 2009, while he was incarcerated at the Wisconsin Resource Center, his hernia began causing him pain. On December 9, 2009, plaintiff submitted a health service request, asking to be seen for pain in the groin area. On January 4, 2010, he was seen by defendant Dr. Carlo

Gaanan. Plaintiff told Gaanan that he was in pain, but Gaanan did not give plaintiff any treatment or medication.

On May 25, 2010, plaintiff was transferred to the Columbia Correctional Institution. On June 14, 2010, he submitted a request to be seen by health services for pain caused by his hernia. Plaintiff was seen by defendant Dr. Dalia Suliene on June 30, 2010. Suliene told plaintiff that before considering surgery, plaintiff should try using a hernia belt. She gave him a belt and told him it would take three months for the belt to begin working. Plaintiff began using the belt, but his symptoms worsened and he continued to feel pain during bowel movements, when standing for long periods, sleeping and walking.

Defendant Suliene saw plaintiff again on September 3 and October 7, 2010 and told him to continue using the belt. Plaintiff responded that the belt was not working and that he would take legal action against Suliene. Later that day, Suliene submitted a request for herniorrhaphy surgery for plaintiff.

On October 12, 2010, defendants Ken Adler, James LaBelle, David Burnett and Dr. Suliene denied the request as part of a cost-saving policy. Plaintiff wrote to defendant Lillian Tenebrusco, the health services manager, about the treatment he had received. Tenebrusco responded by telling plaintiff to continue using the belt as directed by his doctor.

On January 12, 2011, plaintiff was transferred to the New Lisbon Correctional Institution. On January 21, 2011, plaintiff was seen by the institution doctor, defendant Jon

Doe 1. He complained to the doctor about pain and other problems caused by his hernia. The doctor told plaintiff that because "Madison" did not think plaintiff needed surgery, he would not request it on plaintiff's behalf.

On February 14, 2011, plaintiff was seen by institution doctor Zahid Hameed. Hameed told plaintiff that he needed surgery for his hernia. On February 15, Hameed made a "class III" request for surgery to the medical review committee. On February 23, 2011, defendant Burnett denied the request without any explanation.

On March 1, 2011, plaintiff was transferred to the Waupun Correctional Institution. On the same day, plaintiff submitted a health service request, asking to be seen for hernia pain. On March 15, 2011, plaintiff received a letter from the health service nursing coordinator, defendant Cynthia Thorpe, telling plaintiff to continue following his care plan, which consisted of wearing the hernia belt and taking extra-strength Mapap.

On March 17, 2011, plaintiff was seen by an institution doctor, defendant Jon Doe 2. Plaintiff told the doctor that he had been experiencing pain and problems from the hernia. The doctor told plaintiff that the pain was not enough to require surgery, and that if plaintiff wanted surgery, he could have it after his release. The doctor then instructed plaintiff to pull down his pants in the middle of the room, where other inmates and health personnel who were walking by would be able to see him. The doctor gave plaintiff Vitamin D, telling him that it would help with the pain and symptoms of the hernia.

After the visit, plaintiff contacted defendant Belinda Schrubbe, the Waupun health services manager, regarding the treatment he was provided. She responded that "low vitamin D levels can have all kinds of effects. . . wear your belt." Over the next 30 days, plaintiff submitted a number of health service requests.

On May 5, 2011, plaintiff was seen again by defendant John Doe 2. The doctor instructed plaintiff to pull down his pants to be examined, but because plaintiff was in the middle of the room and the door was open, he refused. The visit ended. Plaintiff wrote to defendant Schrubbe about the visit but she never responded.

On May 30, 2011, plaintiff was seen by defendant doctor John Doe 3. During the exam, plaintiff stated that he believed he was being denied adequate medical care. John Doe 3 stated, "I will not let you insult me, this is over . . . leave. Get out." Plaintiff told the doctor that he had been referring to his previous doctors, not him, but the doctor told plaintiff to leave and recorded in his file that plaintiff had refused treatment.

Plaintiff continues to suffer from chronic and substantial pain that limits his daily activities.

DISCUSSION

A. Eighth Amendment Medical Care

Plaintiff contends that defendants Cynthia Thorpe, David Burnett, Ken Adler, Dalia

Suliene, James LaBelle, Carlo Gaanan, Lillian Tenebrusco, Belinda Schrubbe and John Does 1-3 violated his rights under the Eighth Amendment by failing to provide him adequate medical care for his hernia. Under the Eighth Amendment, prison officials have a duty 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 a hernia that causes him significant pain and interferes with daily activities, including standing, walking and sleeping. I can infer that his hernia is a serious medical need that requires treatment. Liberally construing plaintiff's complaint, I conclude that he states a claim under the Eighth Amendment with respect to the following claims related to treatment for his hernia:

- In 2009, defendant Gaanan failed to provide plaintiff any medication or treatment for his hernia;
- In 2010, defendant Suliene failed to provide him effective treatment for his hernia;
- In October 2010, defendants Adler, LaBelle, Burnett and Suliene denied a request for surgery for plaintiff's hernia, even though Suliene had recommended surgery and no other treatments had been effective;
- In October 2010, defendant Tenebrusco, the health services manager, failed to provide plaintiff any medical treatment or intervene on his behalf, even though plaintiff told her he had been receiving ineffective treatment;
- In January 2011, defendant John Doe 1 failed to provide plaintiff any treatment for his hernia or to recommend surgery for it;
- In February 2011, defendant Burnett denied a request for surgery for plaintiff's hernia without explanation;

- In March 2011, defendant Thorpe failed to provide plaintiff any medical treatment for his hernia, instead insisting that he continue using ineffective treatment methods;

- In March 2011, defendant John Doe 2 failed to provide adequate medical treatment for plaintiff's hernia;

- In March and May 2011, defendant Schrubbe failed to provide plaintiff any medical treatment, instead insisting that he continue using ineffective treatment methods; and

- In May 2011, defendant John Doe 3 refused to provide medical treatment for plaintiff's hernia.

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.

In order to prevail on his Eighth Amendment claims at summary judgment or trial, it will not be enough for plaintiff to show that he disagrees with defendants' conclusions about the appropriate treatment for his hernia, 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, 95 F.3d at 592 (internal quotations omitted). Thus, for those defendants who refused to approve surgery for plaintiff's hernia, plaintiff will need to prove that surgery was the only appropriate response to treat his condition and that those defendants were aware that surgery was necessary but insisted he use the hernia belt instead. The law is clear that "[m]ere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996); Snipes, 95 F.3d at 591 (decision "whether one course of treatment is preferable to another" is "beyond the [Eighth] Amendment's purview").

B. Medical Negligence

In his initial complaint and his supplement, plaintiff states that he is also bringing claims against defendants 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 these defendants 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. Considering defendants' actions as described in detail above, it is possible to infer at this stage that defendants' actions were negligent. Therefore, plaintiff may proceed on his state medical negligence claims as well. However, plaintiff should be aware that to establish a prima facie medical negligence claim against a physician, he must show that the defendant failed to use the required degree of skill exercised by an average physician, Wis J-I Civil 1023, and unless the situation is one in which common knowledge affords a basis for finding negligence, medical malpractice cases require expert testimony to establish the standard of care. Carney-Hayes v. Northwest Wisconsin Home Care, Inc., 2005 WI 118, ¶ 37, 284 Wis. 2d 56, 699 N.W.2d 524.

C. Motion for Appointment of Counsel

Plaintiff has filed a motion for appointment of counsel, dkt. #2, stating that he suffers from mental illnesses, has limited legal knowledge and will have difficulty litigating a case with complex medical issues involving defendants at multiple prisons. 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 the 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. It is true that this case is somewhat complicated by the fact that defendants are at multiple prisons and plaintiff does not known the identity of all defendants. However, plaintiff should be able to use discovery techniques to gather this information. At this stage, I cannot

tell whether these complications will be too difficult for plaintiff to overcome.

With respect to the complex medical issues, plaintiff is correct that he will need to prove what medical treatment was necessary and what decisions by defendants may have been inappropriate. In other words, plaintiff may require an expert to be able to prove up his claims. However, plaintiff has no right to appointment of counsel for the purpose of reallocating the time and cost of finding and hiring a medical expert. Finding and retaining an expert is something plaintiff is capable of attempting on his own, although the court acknowledges that it will be difficult for plaintiff to succeed in his attempts.

Finally, it is too early to tell whether plaintiff's mental illnesses will overwhelm his ability to litigate this case. He has not yet shown that his mental health problems have affected his litigation skills. His filings thus far have been well-written and comprehensible. Although he states that he had help preparing his materials, he may continue to receive help from other inmates. 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 Marcuss Childs's motion for appointment of counsel, dkt. #2, is DENIED without prejudice.

2. Plaintiff Marcuss Childs is GRANTED leave to proceed on the following claims under his Eighth Amendment right to adequate medical care and state law medical negligence:

a. In 2009, defendant Gaanan failed to provide plaintiff any medication or treatment for his hernia;

b. In 2010, defendant Suliene failed to provide him effective treatment for his hernia;

c. In October 2010, defendants Adler, LaBelle, Burnett and Suliene denied a request for surgery for plaintiff's hernia, even though Suliene had recommended surgery and no other treatments had been effective;

d. In October 2010, defendant Tenebrusco, the health services manager, failed to provide plaintiff any medical treatment or intervene on his behalf, even though plaintiff told her he had been receiving ineffective treatment;

e. In January 2011, defendant John Doe 1 failed to provide plaintiff any treatment for his hernia or to recommend surgery for it;

f. In February 2011, defendant Burnett denied a request for surgery for plaintiff's hernia without explanation;

g. In March 2011, defendant Thorpe failed to provide plaintiff any medical treatment for his hernia, instead insisting that he continue using ineffective treatment methods;

h. In March 2011, defendant John Doe 2 failed to provide adequate medical treatment for plaintiff's hernia;

i. In March and May 2011, defendant Schrubbe failed to provide plaintiff any medical treatment, instead insisting that he continue using ineffective treatment methods; and

j. In May 2011, defendant John Doe 3 refused to provide medical treatment for plaintiff's hernia.

3. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint, supplement 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.

4. 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.

5. 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 7th day of September 2011.

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