IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

CHARLES LEE HEGNA,

Plaintiff,

OPINION AND ORDER

v.

12-cv-184-bbc

DR. MARY SAUVEY, MORGAN BAILEY, SARA KROPP, DR. PATRICK MURPHY, DONNA LARSON, JUDY P. SMITH, LORI ALSUM and BUREAU OF HEALTH SERVICES,

Defendants.

In this proposed civil action for monetary and declaratory relief, plaintiff Charles Hegna, a prisoner at the Oshkosh Correctional Institution, contends that defendants Dr. Mary Sauvey, Morgan Bailey, Sara Kropp, Dr. Patrick Murphy, Donna Larson, Judy P. Smith, Lori Alsum and the Bureau of Health Services violated his rights under the Eighth Amendment and Wisconsin state law by failing to provide him adequate medical treatment for his left foot. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment of the filing fee.

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 claim that defendants Sauvey, Bailey, Kropp, Murphy, Larson, Smith and Alsum exhibited deliberate indifference to his medical needs in violation of the Eighth Amendment. I also conclude that plaintiff may proceed on his state law medical negligence claims against defendants Murphy, Sauvey, Kropp and Larson. However, I am dismissing plaintiff's claim against the Bureau of Health Services because a claim cannot be brought against a state agency under § 1983.

In his complaint and the documents attached to it, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Charles Hegna is an inmate at the Oshkosh Correctional Institution. The individual defendants were all employed at the institution during the time period relevant to plaintiff's claims. Defendants Dr. Mary Sauvey and Dr. Patrick Murphy are primary care physicians in the health services unit; defendant Morgan Bailey is the assistant manager of the health services unit; defendant Donna Larson is a registered nurse in the health services unit; defendant Sara Kropp was a nurse and the health services unit manager for a portion of the period relevant to plaintiff's claims; defendant Judy Smith is the warden; and defendant Lori

Alsum served as the acting manager of the health services unit for part of 2012. Defendant Bureau of Health Services is part of the Wisconsin Department of Corrections.

On August 5, 2007, plaintiff suffered a serious injury to his left foot near his big toe while playing handball in the gymnasium at the Oshkosh Correctional Institution. He was told by the officer on duty to complete a "blue slip," or health services request form. On August 7, plaintiff was called to health services, where Nurse Kris Eiden examined him. Eiden reported that plaintiff had difficulty with flexion, his foot was dark pink in color and he had pain that she rated as eight out of 10. She scheduled a reevaluation for the next day and a followup appointment with a physician. Eiden completed a special needs form, indicating that plaintiff could not participate in strenuous sports, recreation, school and work from August 7 to 8, 2007. She also wrote that plaintiff should be given an extra pillow, wheelchair, ice eight times a day and shower shoes. No one reevaluated plaintiff on August 8, and plaintiff did not see the assigned physician, defendant Murphy, until March 12, 2010. Plaintiff subsequently submitted several health service requests complaining of pain and swelling, but they went unanswered.

On August 23, 2007, plaintiff was evaluated by a nurse after his sister, Sharon Carter-Wallace, telephoned health services on his behalf. The nurse ordered ice four to six times a day and 200 mg ibuprofen for two weeks. Without seeing plaintiff, defendant Murphy ordered x-rays, which were taken on August 29. Plaintiff never received the x-ray results. On

August 30, 2007, plaintiff submitted a health services request about his foot pain and swelling and asked to be placed on a low bunk on a low tier. He was issued the restriction for August 31 to September 30, 2007. Although Carter-Wallace contacted defendant Kropp three more times in August and September 2007 about the lack of medical attention given to plaintiff, no one in health services saw plaintiff for the remainder of 2007.

After Carter-Wallace telephoned defendant Kropp on January 24, 2008, plaintiff was seen by Nurse Nancy Bowens on January 25, 2008. Bowens issued a temporary low bunk and no-work restriction and told him that Murphy thought that plaintiff's injury could take up to a year to heal. When Carter-Wallace contacted defendant Kropp again on February 4 and 15, 2008, Kropp told her to have plaintiff use the inmate complaint process. Plaintiff filed a health services request on February 10. On February 14, 2008, he received continued restrictions of no work, no strenuous sports and placement on a low bunk. He was told he needed to give his foot time to heal.

Plaintiff more than a year before contacting health services again about his foot. On September 4, 2009, he submitted a health services request, stating that time had not cured his left foot injury and that his condition had worsened. Although an appointment was scheduled, it did not occur. Plaintiff filed an inmate complaint, which was acknowledged on October 13, 2009. The complaint and plaintiff's subsequent appeal were dismissed, and plaintiff was referred to the health services unit.

On October 22, 2009, defendant Larson examined plaintiff, noting that plaintiff rated his pain a six out of 10, that ibuprofen and "APAP aspirin" were ineffective and that plaintiff's left toes and ankle were larger than his right. Although Larson recommended an appointment with Murphy, none was scheduled. On October 29, 2009, a nurse evaluated plaintiff and told him that Larson's previous medical notes listed gout as a possible cause of his problems and outlined several treatment suggestions. Because plaintiff had not heard this from Larson, he filed an inmate complaint on November 2, 2009, complaining about her lack of followup.

Although plaintiff had x-rays and a lipid panel taken in November 2009, he was never given the results. In an inmate complaint acknowledged on December 28, 2009, plaintiff complained about the lack of medical care for his foot. It was dismissed because a followup appointment was scheduled with a nurse. However, that appointment never took place.

During January and February 2010, plaintiff saw various nurses in health services for medication adjustment and a renewal of his restrictions. Although the nurses recommended followup appointments, none occurred. In an inmate complaint acknowledged on February 26, 2010, plaintiff complained that his pain medication and low bunk restriction had expired because he never received the recommended followup appointments. The complaint was dismissed on March 4, 2010, after the low bunk restriction was reinstated for 30 days and a physician appointment was scheduled. Plaintiff also was told to contact the Special Needs Committee about getting a long-term low bunk restriction.

On March 8, 2010, Carter-Wallace contacted defendant Kropp about the difficulty that plaintiff was having in getting an actual appointment with defendant Murphy. In response, Kropp called plaintiff to health services and measured his feet. She indicated that a followup appointment would be scheduled. On March 9, plaintiff was seen by two different nurses. On March 12, 2010, plaintiff saw defendants Murphy and Sauvey, who gave him an intra-articular injection in the MTP joint of his first toe and told him that he may need several more injections over time. Although Murphy promised him a three-month low bunk restriction, no such restriction was processed.

On March 18, 2010, plaintiff submitted a health service request asking for a low bunk restriction and another injection because he was in even greater pain. The next day, defendant Larson responded that she would consult with the doctor and send in the restriction. Because the restriction was not processed, plaintiff sent a letter dated April 9, 2010, requesting that the Special Needs Committee issue him a long-term low bunk restriction. Defendant Kropp serves on the committee. Plaintiff did not receive a response. Plaintiff did receive a second injection from Sauvey on March 31, 2010.

In a June 6, 2010 health services request, plaintiff expressed interest in further foot injections and noted that his current low bunk restriction would expire on June 12. Defendant Larson responded that plaintiff had an upcoming physician appointment and indicated that she would forward his restriction request to the Special Needs Committee. Because the

physician appointment did not occur, plaintiff filed another health services request on June 10. He received a 30-day low bunk restriction on June 15 and a year-long restriction starting July 13, 2010.

On August 5, 2010, Dr. Sauvey saw plaintiff and decreased his indomethacin prescription to 50mg. Sauvey admitted to plaintiff that she was at a loss as to what was wrong with his foot but indicated that the Department of Corrections would require more tests before she could send him to a specialist. Although a uric acid test and lipid panel were performed the next day, plaintiff was not informed of the results.

Over the next five months, plaintiff complained to health services about the severe pain in his left foot. On each occasion, plaintiff was told that a physician appointment was scheduled. However, plaintiff did not see a physician until January 13, 2011, after he had filed two inmate complaints about lack of medical care. In response to a November 19, 2010 complaint filed by plaintiff, the inmate complaint examiner contacted defendant Bailey, who discovered that an appointment had been scheduled for plaintiff on August 5, 2010 but was "bumped" twice and never rescheduled. Plaintiff was told that the providers prioritize the appointments by bumping those that they deem a lower priority. On December 13, 2010, the complaint examiner affirmed plaintiff's complaint and notified defendants Bailey and Kropp. Plaintiff filed another complaint on January 11, 2011 because he still had not seen defendant Sauvey.

On January 13, 2011, defendant Sauvey examined plaintiff, recommended an MRI and prescribed Lidocaine for pain. Plaintiff did not receive the Lidocaine until January 21. Plaintiff submitted four health services requests (on January 20 and 23 and February 2 and 12, 2011), complaining of severe pain and asking for stronger pain medication. In response to each request, he was told only that he had a followup appointment scheduled with a physician.

In a January 26, 2011 authorization request for an MRI for plaintiff, defendant Sauvey falsely listed plaintiff's injury as only one-year old and classified it as a "Class III" versus a "Class III-A." She also listed the necessity as "low." On February 16, Sauvey told plaintiff that he was being sent out for an MRI and prescribed Meloxicam 7.5 mg for pain relief. Plaintiff did not receive the medication until he complained to health services on March 1, 2011.

On March 18, 2011, plaintiff saw Dr. O'Brien, an orthopedic specialist at Columbia Correctional Institution. O'Brien ordered the following for plaintiff: a wooden shoe; no climbing; physical therapy two times a week; a two-month follow up appointment in May 2011; and a pain diary to be kept by plaintiff. That same day, a nurse in health services at the Oshkosh Correctional Institution reviewed O'Brien's orders with plaintiff. Although defendant Sauvey signed the off-site request form from O'Brien on March 21, plaintiff was not

evaluated or called to health services. The health services unit ignored all of O'Brien's orders. As a result, plaintiff filed various complaints:

- Inmate complaint acknowledged on April 6, 2011. Defendant Bailey told the inmate complaint examiner that defendant Sauvey had written her own orders on April 13, 2011, changing the followup appointment to June and crossing out O'Brien's order for physical therapy. The complaint was dismissed. No appointment occurred in June 2011.

- June 10, 2011 health services request about foot pain and inflammation. A nurse responded that an appointment was scheduled for mid-June, but the appointment did not occur.

- June 12, 2011 letter to the Special Needs Committee asking for low bunk restriction and help with getting medical attention. He did not receive a response.

- Inmate complaint acknowledged on June 13, 2011. Defendant Bailey was interviewed and stated two-month followup appointment did not occur because Sauvey bumped it and rescheduled for mid-July. Inmate complaint examiner dismissed complaint, deferring to medical judgment of physician and citing "short delay" in followup appointment.

- Inmate complaint acknowledged on July 25, 2011 about mid-July followup appointment not occurring. Inmate complaint examiner forced appointment to be scheduled for July 26 and dismissed complaint as moot.

During the July 26, 2011 appointment, defendant Sauvey told plaintiff that she would not approve the wooden shoe or physical therapy and that plaintiff would not be permitted to return to O'Brien. Sauvey also changed plaintiff's pain medication to Naproxen, which was ineffective. Given his previous complaints, plaintiff was fitted with a wooden boot on

September 12, 2011 and instructed to wear it daily for one month, when he would have a followup appointment with defendant Sauvey.

After the June 2011 letter to the Special Needs Committee, plaintiff continued to file inmate complaints and health services requests about the denial of his low bunk restriction. Although he did not receive a response for more than a month, a nurse in health services informed plaintiff on September 13 that the Special Needs Committee had determined on July 13 that he did not meet the criteria for a low bunk restriction. Also on September 13, 2011, defendant Kropp entered the denial of the restriction in his medical record. Plaintiff was told in a memorandum that he could "request to be assessed by a Provider" for a restriction. On September 15, 2011, plaintiff filed three health service requests for a restriction. No appointments were scheduled. In an inmate complaint acknowledged on September 16, plaintiff complained about the Special Needs Committee denying his restriction and retaliating against him for filing an inmate complaint, the unanswered health services requests for a restriction and Sauvey's order "to wear a Post-Op boot for obvious continued foot problems." Also on September 16, Carter-Wallace complained to Kropp about the low bunk restriction denial. As a result, Kropp issued plaintiff a low bunk restriction for another year.

In an inmate complaint acknowledged on September 6, 2011, plaintiff complained about the high cost of copies of his medical records, the exclusion of some of his records and

the fact that another inmate's records were delivered to Carter-Wallace. Defendant Smith upheld the rejection of this complaint because the issues did not personally affect plaintiff.

On September 14, 2011, plaintiff wrote defendant Bailey about his inadequate medical care, the unit's refusal to conduct medical record reviews, documents missing from his records and "calculated time delays by Health Services Unit staff to interfere with medical progress and legal process." Bailey referred plaintiff to the inmate complaint system.

Plaintiff requested a refill of his Naproxen on October 19, 2011, but it was not refilled until October 21. On October 25, plaintiff filed a health service request for stronger pain medication. Although he was notified that a physician appointment was scheduled, it did not occur. Defendant Sauvey never changed his pain medication. In an inmate complaint acknowledged on November 4, 2011, plaintiff complained that Sauvey had ignored O'Brien's orders and never scheduled a followup appointment about his post-op boot, forcing him to be in possession of "contraband" beyond the prescribed dates. The inmate complaint examiner contacted Sauvey on November 15 and affirmed the complaint on November 17.

Defendant Sauvey evaluated plaintiff on November 15, 2011 and noted pain and inflammation in his left foot and injury to his right toe from the post-op boot. Sauvey indicated that she did not know what to do about his left foot and refused to treat his right toe, which was black. Sauvey also refused to talk with plaintiff about his chronic nasal congestion. Plaintiff filed a health services request on November 25, 2011, indicating that his

right toe was bloody and full of pus and that the toenail was about to fall off. A nurse prescribed antibiotics the next day and recommended a physician followup appointment. On November 28, 2011, defendant Murphy saw plaintiff and indicated that although plaintiff's right toenail would probably fall off, the infection was healing. Murphy also wrote an order for plaintiff to be seen by Sauvey in four to six weeks for nasal congestion.

In an inmate complaint acknowledged on December 12, 2011, plaintiff complained that Sauvey kept bumping his appointments and was refusing to address his breathing problems. The complaint was dismissed on January 23, 2012 because plaintiff's congestion did not present an urgent need and nasal spray had been ordered on January 10.

On December 16, 2011, plaintiff again saw Dr. O'Brien, who recommended possible surgery, a CT scan and narcotic medication for pain. Plaintiff asked for the narcotics in a health services request filed on December 20 but was told that defendant Sauvey did not think they were necessary. Plaintiff filed an inmate complaint about this issue on December 24 and forwarded a copy to defendant Warden Smith on December 29. On January 17, 2012, Smith explained in writing to plaintiff that his concerns should be sent to the corrections complaint examiner as the next in the chain of command. On December 30, plaintiff filed another inmate complaint about not receiving the narcotic medication. The complaint was dismissed on February 9, 2012, after McCreedy, the health services manager, stated that medical staff can approve or deny an off-site doctor's recommendations.

On January 4, 2012, Carter-Wallace called defendant Alsum with concerns that Sauvey was continuing to delay and impede plaintiff's treatment. Alsum responded that she could not interfere with a physician's medical treatment decisions but that plaintiff could try the inmate complaint process.

As a direct result of his earlier-filed inmate complaints, defendant Sauvey saw plaintiff on January 10, 2012. She prescribed nasal spray for his breathing problems, Prednisone 10mg for his foot and a topical muscle rub for his foot. She continued to refuse plaintiff narcotic medication. On January 12, plaintiff submitted a health services request, reporting increased pain and inflammation with the Prednisone. An appointment with a nurse was scheduled for the next day. Following the appointment, Sauvey told the nurse that plaintiff could discontinue the Prednisone and muscle rub but no alternative would be ordered.

In an inmate complaint acknowledged on January 20, 2012, plaintiff complained that Sauvey had been disregarding his pain and not following Dr. O'Brien's orders. The complaint was dismissed on February 20, 2012 because health services reported that plaintiff was receiving pain medication and physical therapy. Although plaintiff was sent to physical therapy on January 26, 2012, after he filed the complaint, the therapist did not treat him because Sauvey had not provided clear direction or a diagnosis and because plaintiff would be undergoing a CT scan on January 30. Plaintiff reported continued pain in his foot. On February 17, 2012, Dr. O'Brien told plaintiff that the CT scan revealed mild degenerative

arthrosis of the first MTP, a healed fibular sesamoid fracture and sclerotic tibial sesamoid suggesting possible osteonecrosis. O'Brien noted that removing the sesamoids would ease plaintiff's pain and inflammation but would result in a permanent loss of balance and strength.

DISCUSSION

A. Deliberate Indifference

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). A delay in treatment may constitute deliberate

indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain. Estelle, 429 U.S. at 104-05; Gayton v. McCoy, 593 F.3d 610, 619 (7th Cir. 2010); Edwards v. Snyder, 478 F.3d 827, 832 (7th Cir. 2007). The Court of Appeals for the Seventh Circuit also has held that systemic staff shortages that prevent adequate medical care can constitute deliberate indifference to serious medical needs amounting to cruel and unusual punishment under the Eighth Amendment. Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983) (citing Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) ("As a practical matter, 'deliberate indifference' can be evidenced by 'proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.'").

Under the above standard, plaintiff's claim has three basic elements:

(1) Did plaintiff need medical treatment?

(2) Did defendants know that plaintiff needed treatment or that insufficient staffing or policies were impeding his receipt of needed treatment?

(3) Despite their awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment or to insure that appropriate staffing or policies were in place so the treatment could be provided?

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

- Although defendant Murphy was assigned as plaintiff's physician after plaintiff sustained an injury to his left foot on August 5, 2007, Murphy failed to examine, test or otherwise treat plaintiff until March 12, 2010.

- Even though physician appointments were recommended and even scheduled after March 12, 2010, Murphy failed to examine plaintiff or provide him adequate pain medication after that date.

- In March 2010, Murphy failed to provide plaintiff with the low bunk restriction that he had deemed necessary for plaintiff.

- On March 12, 2010, defendants Sauvey and Murphy failed to perform any diagnostic tests and misdiagnosed plaintiff as needing an intra-articular injection in his toe joint.

- On October 22, 2009, defendant Larson failed to schedule a recommended followup appointment for plaintiff or advise defendant Murphy of the severity of plaintiff's condition.

- In March 2010, Larson failed to consult with plaintiff's doctor about giving plaintiff another injection and did not process plaintiff's low bunk restriction.

- Between March 2010 and January 2012, defendant Sauvey regularly "bumped" or canceled her appointments with plaintiff, failed to document and enforce his special needs restrictions, did not refer plaintiff to a specialist until March 2011, ignored the recommendations and orders issued by the specialist (Dr. O'Brien) and did not provide plaintiff adequate pain medication.

- On November 15, 2011, Sauvey refused to treat plaintiff's painful and infected right toe, which remained untreated until November 26, 2011.

- In 2010 and 2011, defendant Bailey knew that plaintiff's physician appointments were being canceled but failed to take action to make sure plaintiff received the medical care he needed.

- Although defendant Kropp was told repeatedly of plaintiff's need for medical attention between August 2007 and the end of 2010, she failed to take action to make sure plaintiff received the medical care he needed.

- Between April 9, 2010 and June 15, 2010 and June 12, 2011 and September 16, 2011, defendant Kropp ignored plaintiff's requests for a low bunk restriction.

- In January 2012, defendant Alsum failed to take action to make sure plaintiff received the medical care he needed.

- Defendants Bailey, Kropp and Smith failed to provide adequate numbers of qualified medical staff in the health services unit, preventing plaintiff from receiving the treatment he required.

At summary judgment or trial, it will not be enough for plaintiff to show that he disagrees with the medical professionals' conclusions about the appropriate treatment for his foot, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that these 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).

Because at this early stage it is plausible to infer that the warden may have responsibility and authority with respect to the number of physicians employed in the health services unit at the institution, I am allowing plaintiff to bring a claim to this effect against defendant Smith, as well as defendants Kropp and Bailey. However, to the extent that plaintiff named Smith as a defendant because he believes that a warden may be held liable for constitutional violations of her employees, he is mistaken.

Under 42 U.S.C. §1983, the statute authorizing lawsuits for constitutional violations, a person may not be held liable unless she was personally involved in the violation. This means that an official must have participated in the alleged conduct or facilitated it. It is not enough to show that a particular defendant is the supervisor of someone else who committed a constitutional violation. Burks v. Raemisch, 555 F.3d 592, 593-94 (7th Cir. 2009) ("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise.").

Thus, even though defendant Smith is the warden, she is not required to insure that the health services unit provided plaintiff specific care or treatment. As an administrator with no medical expertise or training, Smith is entitled to defer to the judgment of medical professionals so long as she did not ignore plaintiff or directly cause him harm. Berry v. Peterman, 604 F.3d 435, 440 (7th Cir. 2010) ("As . . . a host of . . . cases make clear, the law encourages non-medical security and administrative personnel at jails and prisons to defer to the professional medical judgments of the physicians and nurses treating the prisoners in their care without fear of liability for doing so.") (citing Hayes v. Snyder, 546 F.3d 516, 527-28 (7th Cir. 2008)); Johnson v. Doughty, 433 F.3d 1001, 1010-11 (7th Cir. 2006); Greeno v. Daley, 414 F.3d 645, 655-56 (7th Cir. 2005); Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004)). Cf. Richman v. Sheahan, 512 F.3d 876, 885 (7th Cir. 2008) ("there is an exception for the case in which [a public employee] is responsible for creating the peril that creates an occasion for rescue). "Public officials do not have a free-floating obligation to put things to rights . . . Bureaucracies divide tasks; no prisoner

is entitled to insist that one employee do another's job." Burks v. Raemisch, 555 F.3d 592, 595-96 (7th Cir. 2009).

Finally, I am not allowing plaintiff to proceed against defendant Bureau of Health Services because it is part of the Department of Corrections, a state agency. "A cause of action under § 1983 requires a showing that the plaintiff was deprived of a right secured by the Constitution or federal law, by a *person* acting under color of law." Padula v. Leimbach, 656 F.3d 595, 600 (7th Cir. 2011) (emphasis added). Because state agencies are not "persons" within the meaning of § 1983, they cannot be sued under that statute. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66 (1989); Williams v. Wisconsin, 336 F.3d 576, 580 (7th Cir. 2003); Ryan v. Illinois Department of Children and Family Services, 185 F.3d 751,758 (7th Cir. 1999). Therefore, defendant Bureau of Health Services will be dismissed.

B. Medical Negligence

Plaintiff also seeks to bring state law medical negligence claims against defendants Murphy, Sauvey, Kropp and Larson. 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 on a claim for medical negligence in Wisconsin, plaintiff must prove that defendants breached their duty of care and plaintiff suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. Considering plaintiff's allegations that defendants Murphy, Sauvey, Kropp and Larson repeatedly failed to treat his foot problems in a timely and effective manner, it is possible to infer at this stage that they 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 Murphy and Sauvey, he must show that the physicians failed to use the required degree of skill exercised by an average physician. Wis J-I Civil 1023. Further, 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.

ORDER

IT IS ORDERED that

1. Plaintiff Charles Hegna is GRANTED leave to proceed on his claims that a) defendants Dr. Mary Sauvey, Morgan Bailey, Sara Kropp, Dr. Patrick Murphy, Donna Larson, Judy P. Smith and Lori Alsum violated his rights under the Eighth Amendment by acting with deliberate indifference to his serious medical need; and b) the actions of defendants Murphy, Sauvey, Kropp and Larson constituted medical negligence under Wisconsin state law.

2. Plaintiff is DENIED leave to proceed on his claim against defendant Bureau of Health Services.

3. 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.

4. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer or lawyers will be representing defendants, he should serve the lawyers 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.

6. Plaintiff is obligated to pay the balance of his unpaid filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed 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 17th day of May, 2012.

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