IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CARL BARRETT,

Plaintiff,

OPINION AND ORDER

12-cv-24-bbc

v.

LAVERN WALLACE and SHAWN GALLINGER,

Defendants.

- -

In an order entered March 4, 2012, I granted plaintiff Carl Barrett leave to proceed on his claim that defendants Lavern Wallace and Shawn Gallinger violated his rights under the Eighth Amendment by failing to take measures to prevent him from harming himself, despite knowing that he was suicidal. Before plaintiff's complaint was screened, he filed a proposed amended complaint. After this complaint was served, plaintiff filed a motion to amend his complaint again, seeking to add claims against eighteen new defendants and a new claim for a violation of the Americans with Disabilities Act, 42 U.S.C. § 12132.

The motion to amend the complaint a second time will be granted because it was filed within the time limit set by Fed. R. Civ. P. 15(a)(1)(B), as extended by the court's order entered July 20, 2012. Because plaintiff is an inmate, the Prison Litigation Reform Act requires the court to screen plaintiff's second amended complaint and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money

damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

After reviewing the second amended complaint, I find that plaintiff's allegations are sufficient to state a claim against (1) defendants Wallace and Gallinger for failure to protect plaintiff, in violation of the Eighth Amendment; (2) defendants S. Hoem, W. Brown, L. Brown and Gallinger for using excessive force against plaintiff, in violation of the Eighth Amendment; (3) defendants Lynda Schwandt, Lt. Tom and Lt. Hanfield for punishing plaintiff for conduct he could not control, in violation of the Eighth Amendment; and (4) defendants Don Hands, Kevin Kallas, Rick Raemisch, Scott Ruebenash and Peter Huibregtse for maintaining policies that caused these violations. However, plaintiff has failed to state a claim under the ADA, and plaintiff's claim for excessive force against defendants Capt. Primer, Lt. Stewart, C.O. Cockroft, C.O. Hassell, Matthew Scullion and C.O. Wohland must be dismissed as improperly joined under Fed. R. Civ. P. 20.

In his second amended complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. The Parties

Plaintiff Carl Barrett is an inmate at the Columbia Correctional Institution. At all relevant times for this lawsuit, plaintiff was incarcerated at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin.

Several of the defendants are officers of the Wisconsin Department of Corrections. Defendant Don Hands is the psychology director, Kevin Kallas is the mental health director

and Rick Raemisch is the Secretary of the department.

The remaining defendants are employees of the Wisconsin Department of Corrections, working at the Wisconsin Secure Program Facility. Defendant Peter Huibregtse is the warden and defendant Lynda Schwandt is the security director. Defendant Scott Ruebenash is the psychological services unit manager and head psychologist. Defendant Lt. Tom and Lt. Hanfield are hearing officers. Defendant Lt. Stewart and Lt. Primmer are security supervisors. Defendants Shawn Gallinger, Lavern Wallace, Matthew Scullion, C.O. Wholand, C.O. Hassell and C.O. Cockroft are correctional officers. The complaint does not identify the positions held by defendants Hoem, W. Brown and L. Brown, although it appears from other allegations that they are either correctional officers or supervisors.

B. Plaintiff's Suicide Attempts

At all relevant times, plaintiff was prescribed and taking "doxepin, citalopram and risperidone, all psychotropic drugs known to cause anxiety . . . as well as mood swings, increase in energy, reckless behavior, anger, fear and depression, and even thoughts of suicide." Plaintiff experienced these side effects.

Defendants Gallinger, Hassell, Cockroft, Wohland, Scullion, Stewart, W. Brown, L. Brown, Primmer, Tom, Hanfield, Schwandt and Huibregtse either witnessed plaintiff's behavior or read reports about his "episodes." They treated plaintiff's behavior only as a disciplinary problem and viewed him with hostility.

While at the Wisconsin Secure Program Facility, plaintiff attempted to commit

suicide on three occasions. On September 21, 2010, plaintiff attempted suicide by overdose. Although plaintiff was unconscious, defendants W. Brown and L. Brown responded with tear gas and pepper spray, which caused plaintiff difficulty breathing and burned his eyes, mouth, nose and lungs. Defendant Hoem was present during the incident and "allowed security staff to deal with [plaintiff] on a disruptive inmate level and use force against him, as opposed to as a mental health crisis." "It was found" that the medications that plaintiff was given by correctional officers included "PCP."

The second incident occurred on October 4, 2010. At approximately 8:00 a.m., plaintiff informed defendant Wallace that he had a handful of pills, was going to kill himself and needed to speak with someone from the psychological services unit. Wallace denied plaintiff's request, told plaintiff several times that he was not "calling anybody" and then stopped answering plaintiff's emergency call button. When other inmates pressed their call buttons to get help for plaintiff, defendant Wallace denied or ignored them as well. Eventually, defendant Gallinger came to plaintiff's cell. Plaintiff showed Gallinger his handful of pills and told him he was feeling suicidal and need to speak to someone. Although Gallinger was aware of plaintiff's previous suicide attempt, he responded, "Go ahead and take them, I don't care."

After Barrett took the pills, Wallace and Gallinger finally contacted a member of the psychological services unit and plaintiff was rushed to the hospital emergency room, where he was treated for poisoning. (Plaintiff identifies this staff member as "defendant Becker," but Becker is not included in the caption and the complaint contains no other facts about

him.) After the incident, defendant Schwandt gave plaintiff another conduct report and defendant Hanfield punished him with 360 days of program segregation and $4,676.70 in "unproven medical bills."

On January 26, 2011, plaintiff again attempted suicide by overdose. Again, defendants W. Brown and Gallinger responded by spraying plaintiff with tear gas or pepper spray in the midst of his overdose. Defendant Schwandt issued plaintiff a conduct report for the suicide attempt, and defendant Tom punished plaintiff with a forty-day extension of his mandatory release date and $3,771.83 in "unproven medical bills."

C. October 14, 2010 Incident

Plaintiff suffers from pain caused by a rod in his leg, which sometimes prevents him from placing any pressure on certain areas, including his knees. As a result, plaintiff has a "no kneel" medical restriction.

On October 14, 2010, plaintiff requested medical treatment for his leg. The unit staff told him to kneel down for shackles so that he could be taken to see medical staff. When plaintiff informed them about his "no kneel" restriction, they said he was refusing treatment. This caused a mood swing in plaintiff and he covered up the windows and camera in his cell. From their knowledge of plaintiff's past behavior, defendants Primmer, Stewart, Cockroft, Hassell, Scullion and Wohland believed that plaintiff was simply being disobedient and decided to teach him a lesson by forcing him to kneel. Primmer authorized Stewart to use force against plaintiff, including electric shock.

Stewart, Cockroft, Hassell, Scullion and Wohland approached plaintiff's cell and demanded that he come to the door to be removed from the cell. Plaintiff agreed to be removed but told them he could not kneel because of the pain in his leg. Stewart instructed the others to proceed, and plaintiff approached the door backwards. Plaintiff placed his hands through the top door trap and was handcuffed with handcuffs tethered to the door. Defendants never opened the lower door trap, which could have been used to shackle plaintiff while standing. Instead, they ordered plaintiff to back out of the cell and kneel. When he responded that he could not kneel because of the pain, they slammed him to the floor, bent his wrists and neck, stomped and stood on his knee and applied electric shock directly to his knee. They choked plaintiff, covered his mouth and nose and dragged him off the range. For this incident, defendant Tom punished plaintiff with 240 days of segregation and a 45-day loss of recreation.

D. Mental Health Policies

The mental health treatment policy at the Wisconsin Secure Program Facility is to keep mentally ill patients in disciplinary segregation and to prescribe psychotropic medication in dangerous amounts. "Common correctional officers" are required to handle mental health cases, including administering medications and responding to mental health crises, such as when prisoners attempt or threaten to attempt suicide. They often respond with discipline to inmate behavior that is consistent with their mental illnesses, overriding the recommendations and treatment plans of mental health staff. They have threatened to

withhold medication or deliberately provide the wrong medication.

Officers have often responded to plaintiff's behavior with "ridicule, taunting, retaliation, excessive force and vendetta style disciplinary and restrictive measures." In addition to the punishments that plaintiff received for his suicide attempts, defendants Tom and Hanfield issued eight conduct reports to plaintiff in October 2010 for "act[ing] out in other ways consistent with his mental illness."

With respect to defendants Hands, Kallas, Raemisch, Ruebenash and Huibregtse, the complaint alleges only that they are responsible for making sure that inmates "have an adequate mental health care system and that mentally ill prisoners aren't left to the hands of unqualified common correctional officers, and disciplinary segregation and dangerous amounts of psychotropic medication as the primary treatment."

OPINION

A. Joinder of Defendants

As the Court of Appeals for the Seventh Circuit has emphasized, district courts have an independent duty to apply the permissive joinder rule stated in Fed. R. Civ. P. 20 to prevent improperly joined parties from proceeding in a single case. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). Rule 20 prohibits a plaintiff from asserting unrelated claims against different defendants or sets of defendants in the same lawsuit. Multiple defendants may not be joined in a single lawsuit unless the plaintiff asserts at least one claim against each of them that arises out of the same transaction, occurrence or series of transactions or

occurrences and presents questions of law or fact common to all. George, 507 F.3d at 607; 3A Moore's Federal Practice § 20.06, at 2036-45 (2d ed. 1978).

Plaintiff's second amended complaint can be read as containing six claims against six groups of defendants:

1) defendants Wallace and Gallinger failed to prevent plaintiff from harming himself on October 4, 2010;

2) defendants W. Brown, L. Brown, Hoem and Gallinger responded to plaintiff's suicide attempts on September 20, 2010, and January 26, 2011, with excessive force;

3) defendants Schwandt, Tom and Hanfield punished plaintiff for behavior caused by his mental health issues, including his suicide attempts;

4) defendants Hands, Kallas, Raemisch, Ruebenash and Huibregtse required unqualified correctional officers at the Wisconsin Secure Program Facility to dispense medications and to handle mental health crises;

5) unspecified defendants violated the Americans with Disabilities Act;

6) defendants Primmer, Stewart, Cockroft, Hassell, Scullion and Wohland used excessive force when removing plaintiff from his cell.

The first five claims may be fairly interpreted as arising out of the "same transaction, occurrence, or series of transactions or occurrences," insofar as each claim concerns the adequacy of plaintiff's mental health care for his suicidal condition. However, the sixth claim for excessive force involves different defendants and factual circumstances. The mere fact that the defendants were motivated by a belief that plaintiff was misbehaving, rather

than under the influence of mental illness or medication, is not enough to connect the claims or show that they arose from the "same transaction."

Because plaintiff was granted leave to proceed on his failure to protect claim against defendants Wallace and Gallinger, and because the majority of plaintiff's claims in the new complaint concern the adequacy of his mental health treatment, I will proceed to screen those claims. Defendants Primmer, Stewart, Cockroft, Hassell, Scullion and Wohland will be dismissed. If plaintiff wishes to file a claim for excessive force against these defendants, he must file a new complaint.

B. Failure to Prevent Acts of Self Harm

Prisoners have a right under the Eighth Amendment to receive adequate medical care, Estelle v. Gamble, 429 U.S. 97 (1976), which includes a right to appropriate mental health treatment. Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983). In addition, prison officials have a duty to protect prisoners from harming themselves as a result of a mental illness. Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003). The question for plaintiff's failure to protect claim is whether defendants were aware of a substantial risk to his health or safety and failed to take reasonable measures to abate that risk. Farmer v. Brennan, 511 U.S. 825 (1994).

Plaintiff's second amended complaint contains no new allegations against defendants Wallace and Gallinger for their failure to respond to his suicide threat, so plaintiff may proceed against those defendants on his failure to protect claim.

C. Excessive Force

Plaintiff next contends that defendants W. Brown, L. Brown, Hoem and Gallinger 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 incapacitated by the overdose of medication, defendants W. Brown, L. Brown, Hoem and Gallinger sprayed him with tear gas and pepper spray. If plaintiff's allegations are true, then he may be able to prove that defendants applied tear gas and pepper spray for the sole purpose of harming him. Accordingly, I will allow plaintiff to proceed on his excessive force claim against defendants W. Brown, L. Brown, Hoem and Gallinger.

D. Discipline for Self Harm

Plaintiff's next claim raises a novel question: is it cruel and unusual punishment to discipline a prisoner for harming himself if the prisoner does so as a result of mental illness?

This claim could implicate the Eighth Amendment in two ways. First, plaintiff may mean to contend that punishment for behavior that he cannot control violates the Eighth Amendment. Robinson v. California, 370 U.S. 660, 667 (1962) (statute criminalizing being "addicted to the use of narcotics" violated Eighth Amendment because it is "an illness which may be contracted innocently or involuntarily"); Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006) (statute prohibiting homeless people from sitting, lying or sleeping on public streets and sidewalks violates Eighth Amendment because homeless people cannot avoid doing those things). Second, plaintiff may mean to contend that defendants disregarded his mental illness by placing him in segregation, which exacerbated his condition, rather than providing him mental health treatment. Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004) (under Eighth Amendment, "mental health needs are no less serious than physical needs"); Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1116 (W.D. Wis. 2001) (when conditions of confinement "are so severe and restrictive that they exacerbate the symptoms that mentally ill inmates exhibit," this may result in cruel and unusual punishment).

Although the scope of these rights is unclear, I conclude that plaintiff has alleged enough facts to state a claim under both theories. Plaintiff has alleged that defendants Schwandt, Tom and Hanfield punished him with 720 days in segregation, a forty-day extension of his sentence and numerous conduct reports for behavior caused by his mental illness and medications.

At summary judgment or trial, plaintiff will have to show with respect to the first claim not only that he could not control his actions, but that defendants Schwandt, Tom and

Hanfield *knew* this before imposing these punishments. Prison officials cannot be held liable under the Eighth Amendment for making a mistake, even one that demonstrates negligence. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996) ("[A] defendant's inadvertent error [or] negligence . . . is insufficient to rise to the level of an Eighth Amendment constitutional violation."); Wilson v. Seiter, 501 U.S. 294, 299-300 (1991) (Eighth Amendment "mandate[s] inquiry into a prison official's state of mind" because word "punishment" implies "intent requirement"). Further, defendants remain free to argue that the Eighth Amendment does not prohibit prison officials for punishing acts of self harm, even when they are caused by mental illness. With respect to the second claim, plaintiff will have to show that defendants knew that placing him in segregation would exacerbate his mental illness and that there were other reasonable steps they could have taken to provide him treatment.

E. Official Capacity Suit

Plaintiff cannot sue defendants Hands, Kallas, Raemisch, Ruebenash and Huibregtse in their individual capacities. Personal liability under 42 U.S.C. § 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), and plaintiff does not allege that any of these defendants were involved in any of the specific incidents in which plaintiff's rights were allegedly violated.

However, plaintiff has also filed claims against these individuals in their official

capacities. "An official capacity suit is tantamount to a claim against the government entity itself," Guzman v. Sheahan, 495 F.3d 852, 859 (7th Cir. 2007), so plaintiff must establish that the deliberate indifference to which he was subjected came about as a result of a custom or policy established by these officials. See Monell v. Dept. of Social Services of City of New York, 436 U.S. 658, 690-91 (1978). Courts recognize three forms of unconstitutional policies or customs:

> (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policy-making authority.

Palmer v. Marion County, 327 F.3d 588, 595 (7th Cir. 2003) (quotation omitted).

Plaintiff alleges that unqualified correctional officers at the Wisconsin Secure Program Facility are required to dispense medications and to respond to inmates' mental health crises. One can infer from the complaint that these policies caused the deliberate indifference and excessive force to which plaintiff was allegedly subjected. Correctional officers gave plaintiff PCP with his medication and responded to his suicide attempts in inappropriate ways on multiple occasions. Furthermore, plaintiff was punished repeatedly for suicide attempts and behavior relating to his mental illness. Defendants Hands, Kallas, Raemisch, Ruebenash and Huibregtse are officers with the authority to set Department of Corrections policy in the area of prisoner mental heath. At this early stage of the litigation, these allegations are sufficient to suggest that these defendants maintained a policy or practice that caused the alleged violations of plaintiff's constitutional rights.

The court will permit plaintiff to proceed against these individuals only for the purposes of obtaining injunctive or declaratory relief from the unlawful custom or policy. Plaintiff may not bring a claim for money damages against these defendants in their official capacity, because a "suit for damages against a state official in his or her official capacity is a suit against the state for Eleventh Amendment purposes," and thus barred by the sovereign immunity doctrine. Shockley v. Jones, 823 F.2d 1068, 1070 (7th Cir. 1987). In addition, plaintiff will not be granted leave to proceed on his claim against the Wisconsin Department of Corrections. Lawsuits like plaintiff's for constitutional violations must be brought under 42 U.S.C. § 1983, a statute that applies only to "persons." Because the Supreme Court has concluded that state agencies like the Wisconsin Department of Corrections are not "persons" within the meaning of the statute, the department may not be sued under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 65-66 (1989).

D. Americans with Disabilities Act

In addition to his Eighth Amendment claims, plaintiff has also asserted that defendants violated Title II of the Americans with Disabilities Act. Title II of the ADA states that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. "Public entity" includes any department, agency or instrumentality of a state or local government. 42 U.S.C. § 12131(1)(B); Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998) (ADA applies to state

prisons). Thus, to state a claim under the ADA, plaintiff must identify (1) a "physical or mental impairment that substantially limits one or more 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; and (3) the "reasonable accommodation" he is seeking that a particular defendant has refused to provide. 42 U.S.C. § 12131(2).

Plaintiff has not stated a claim under the ADA. Although I can infer that plaintiff suffers from a mental impairment from his repeated suicide attempts, plaintiff has not alleged that his mental impairment substantially limits one or more of his major life activities. Additionally, plaintiff has not alleged that he is being denied services, programs or activities at the prison because of his mental impairment or that he is seeking a particular "reasonable accommodation" in order to participate in a prison program or activity. Plaintiff's allegation that he was denied access to adequate mental health facilities fails to state a claim under Title II because he does not allege that defendants denied him treatment *because of* his mental impairment. Therefore, I will dismiss his ADA claims. Because the ADA claim is the only claim under which plaintiff could sue defendant Wisconsin Department of Corrections, I will dismiss it from the case.

ORDER

IT IS ORDERED that

1. Plaintiff Carl Barrett's motion to amend his complaint, dkt. #9, is GRANTED.
2. Plaintiff is GRANTED leave to proceed on the following claims:

a. defendants Lavern Wallace and Shawn Gallinger failed to protect him from self harm in violation of the Eighth Amendment;

b. defendants S. Hoem, W. Brown, L. Brown and Gallinger engaged in excessive force in violation of the Eighth Amendment;

c. defendants Lynda Schwandt, Lt. Tom and Lt. Hanfield punished plaintiff for conduct he could not control in violation of the Eighth Amendment; and

d. defendants Don Hands, Kevin Kallas, Rick Raemisch, Scott Ruebenash and Peter Huibregtse maintained policies that caused the alleged Eighth Amendment violations.

2. Plaintiff is DENIED leave to proceed on his remaining claims.

3. Plaintiff's claim that defendants violated the Americans with Disabilities Act is DISMISSED without prejudice for failure to state a claim under Fed. R. Civ. P. 12; and

4. Plaintiff's claim that defendants Capt. Primer, Lt. Stewart, C.O. Cockroft, C.O. Hassell, Matthew Scullion and C.O. Wohland engaged in excessive force in violation of the Eighth Amendment is DISMISSED for improper joinder under Rule 20.

5. The complaint is DISMISSED as to defendants Department of Corrections, Primer, Stewart, Cockroft, Hassell, Scullion and Wohland.

Entered this 24th day of August, 2012.

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