IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PHILIP PATRICK SHEAHAN,

Plaintiff,

v.

DR. SULIENE, HSU Manager N. WHITE, JOHN DOE NURSE, DR. SPRIGS and CAPTAIN D. MORGAN,

Defendants.

OPINION and ORDER

12-cv-433-bbc

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Plaintiff Philip Sheahan, an inmate currently incarcerated at the Wisconsin Secure Program Facility, has filed a proposed civil complaint alleging that prison staff at the Columbia Correctional Institution violated his constitutional rights in several ways regarding hand injuries he suffered while working there. Plaintiff is proceeding in forma pauperis and has made the initial partial payment previously assessed by this court.

The next step in the case is to screen the complaint under 28 U.S.C. § 1915 to determine whether any portion 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. Plaintiff is a pro se litigant, which means his complaint will be construed liberally as it is reviewed for these potential defects. Haines v. Kerner, 404 U.S. 519, 521 (1972). After examining plaintiff's complaint, I conclude that he may proceed on Eighth Amendment deliberate indifference and First Amendment retaliation claims against

defendants for their treatment of his injured hand and their decisions to force him to work despite his injuries. He will not be allowed to proceed on his access to the courts claim. Finally, I will stay a decision regarding his state court medical negligence claims until he submits a supplement to the complaint indicating whether he has complied with the Wisconsin notice of claim statute.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

At the times relevant to this lawsuit, plaintiff Philip Sheahan was incarcerated at the Columbia Correctional Institution. On July 25, 2011, while performing his job for Badger State Industries, plaintiff "suffered two very serious injuries to [his] left hand." (Plaintiff does not describe what he was doing or the precise nature of the injuries.) He was rushed by ambulance to Divine Savior Hospital in Portage, Wisconsin. The injuries caused plaintiff severe pain and left two "disfiguring scars." Also, plaintiff has not yet regained the full function or feeling in his left thumb.

Plaintiff returned to the Columbia Correctional Institution later that day. Plaintiff states that he "was supposed to be placed on work-restriction." Plaintiff was instructed by defendant Health Services Unit Manager N. White that despite his injuries he would have to return to work without any kind of restriction. White made this determination despite being present when plaintiff was injured and being aware of the severity of his injuries. Plaintiff suffered severe pain while being forced to work.

Plaintiff was seen by defendant Dr. Suliene on July 26, 2011 for a followup as

instructed by the hospital. Suliene decided not to order a work restriction for plaintiff. On August 1, 2011 plaintiff asked the officer on duty to contact the Health Services Unit because he was suffering severe pain while working. Plaintiff was seen by defendant Dr. Springs. Plaintiff stated that he was in severe pain but Springs responded, "I'm not here to argue with you about narcotics." Defendant John Doe nurse gave plaintiff a narcotic pill for the pain. Springs told Nurse Doe to remove plaintiff's stitches, even though it was three days prior to the date instructed by a doctor at the hospital.

On August 3, 2011, plaintiff contacted defendant White, requesting that pictures of his wounds be taken "for attorney purposes." The Health Services Unit directed plaintiff to forward his request to Security Director Nickel. Defendant Administrative Captain D. Morgan stated, "I am denying your request for the institution to take photos of your injury." Morgan knew that plaintiff intended to use the photos in a civil action against prison staff.

OPINION

I understand plaintiff to be attempting to bring the following claims: (1) Eighth Amendment deliberate indifference claims against defendants White, Suliene, Springs and Nurse Doe; (2) state law medical negligence claims against defendants Suliene and Nurse Doe; (3) First Amendment retaliation claims against defendants Springs and Doe; and (4) an access to the courts claim against defendant Morgan. I will discuss each set of claims in turn.

A. Deliberate Indifference

Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. 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. Id. at 104.

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). 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, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), 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 defendant was 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). 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). However, inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the

meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91. Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. Gutierrez, 111 F.3d at 1374; Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) ("[E]ven admitted medical malpractice does not give rise to a constitutional violation.").

At this early stage of the proceedings I can infer that plaintiff's injured hand was a serious medical need. Plaintiff alleges that defendant Health Services Unit Manager White would not place him on a work restriction despite knowing the extent of his injuries, which I conclude states a deliberate indifference claim because it is possible that White knew that forcing plaintiff to work without a restriction would cause him severe pain. Similarly, plaintiff states a claim against defendant Suliene for not imposing a work restriction. Plaintiff also states claims against defendant Springs for ordering his stitches removed prematurely and against Nurse Doe for removing the stitches. However, I warn plaintiff that going forward, he will not prevail on his deliberate indifference claims unless he can show that these defendants' decisions constituted "substantial departure[s] from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).

B. Medical Negligence

Plaintiff seems to argue that defendants Suliene's and Nurse Doe's actions also constitute medical negligence under Wisconsin law (plaintiff does not appear to be attempting to raise negligence claims against defendants White or Springs, but he is free to amend his complaint if he thinks I have misconstrued his pleading). However, when an individual intends to sue a government official acting in his official capacity, Wisconsin law requires the individual to file a notice of claim with the attorney general's office. The individual cannot bring suit until the claim has been disallowed or rejected. Ibrahim v. Samore, 118 Wis. 2d 720, 726, 348 N.W.2d 554, 558 (1984) ("The notice of injury statute 'is not a statute of limitation but imposes a condition precedent to the right to maintain an action.'"). Wis. Stat. § 893.82(3m) states:

> If the claimant is a prisoner, as defined in s. 801.02 (7)(a)2., the prisoner may not commence the civil action or proceeding until the attorney general denies the claim or until 120 days after the written notice under sub. (3) is served upon the attorney general, whichever is earlier.

In his complaint, plaintiff does not say whether he has filed a notice of claim that has been disallowed. Because this is a threshold requirement for filing a state law claim against defendant, I will stay a decision on whether to grant plaintiff leave to proceed on his state law claims for medical negligence and give him an opportunity to supplement his complaint with this information. Upon receiving plaintiff's supplement, I will screen his negligence claims and arrange for service of the complaint and supplement on defendants. If plaintiff fails to supplement his complaint by November 14, 2012, I will dismiss those claims.

C. Retaliation

I understand plaintiff to be alleging that defendants Springs and Nurse Doe retaliated against plaintiff for an argument they had regarding pain medication by removing his stitches three days early. In order to state a First Amendment claim for retaliation, plaintiff must identify (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by each defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that plaintiff's protected activity was one of the reasons defendants took the action they did against him. Bridges v. Gilbert, 557 F.3d 541, 556 (7th Cir. 2009). Even though plaintiff's allegations about his argument with defendant Springs are quite vague, I understand plaintiff's request for pain treatment to be a protected activity, e.g. West v. McCaughtry, 971 F.Supp. 1272, 1277 (E.D. Wis. 1997) ("If a prisoner were disciplined solely because of his requests for proper medical treatment, it would surely be a constitutional violation."). I conclude that plaintiff states retaliation claims against defendant Springs and Nurse Doe, if only barely, for removing his stitches early following the argument. To the extent that I must accept as true the inference from plaintiff's allegations that the stitches were intentionally removed prematurely, those actions could deter a person of ordinary fitness from raising questions with medical staff in the future. Construing plaintiff's allegations generously at this stage of the proceedings, I conclude that it is plausible that the stitches were removed in response to the argument. However, I note that at summary judgment or trial, plaintiff will need to provide more detail about his

conversations with Springs and Doe. making clear that they removed the stitches because of the argument.

D. Access to Courts

Finally, plaintiff alleges that defendant Morgan refused to take photographs of plaintiff's injuries, which he characterizes as an access to the court claim. It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004); Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)). The right of access is grounded in the due process and equal protection clauses. Murray v. Giarratano, 492 U.S. 1, 6 (1989).

To state a claim, the prisoner must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). This rule is derived from the doctrine of standing, id., and requires the prisoner to demonstrate that a non-frivolous legal claim has been frustrated or impeded. In other words, the prisoner must plead at least general factual allegations suggesting that he "has suffered an injury over and above the denial." Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). At a minimum, he must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." Id.; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint).

I conclude that plaintiff fails to state an access to the courts claim; the problem plaintiff faces is that he cannot show that the refusal to photograph his injuries has hampered him in litigating *this* case. There is some slight risk that at some future point in this lawsuit, plaintiff's ability to prevail on his claims might be limited by the unavailability of these materials. For now, however, his access to courts claim is not something that can be raised in this case.

ORDER

IT IS ORDERED that

1. Plaintiff Philip Sheahan is GRANTED leave to proceed on his Eighth Amendment deliberate indifference claims against defendants N. White, Dr. Suliene, Dr. Springs and John Doe Nurse and First Amendment retaliation claims against Springs and Doe.

2. Plaintiff is DENIED leave to proceed on his access to the courts claim against defendant D. Morgan. Defendant Morgan is DISMISSED from the case.

3. A decision on plaintiff's request for leave to proceed on his state law medical negligence claims is STAYED. Plaintiff may have until November 14, 2012, in which to supplement his complaint with information about his compliance with notice requirements under Wis. Stat. § 893.82. If plaintiff does not submit a supplement to his complaint by that date, his state law claims against defendants will be dismissed.

4. Service of the complaint on defendants is STAYED pending receipt and screening

of plaintiff's supplement to his complaint.

Entered this 31st day of October, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge