

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

GLENN T. TURNER,

Plaintiff,

v.

RICHARD SCHNEITER, PETER HUIBREGTSE,
BURTON COX, JR., JOLINDA WATERMAN,
MS. CAMPBELL and JOHN/JANE DOE HSU MANAGER,

Defendants.

OPINION AND ORDER

12-cv-502-bbc

Pro se plaintiff Glenn Turner has filed a proposed complaint that is ready for review under 28 U.S.C. § 1915(e)(2), which requires the court to screen any complaint filed by prisoners to determine whether the complaint states a claim upon which relief may be granted. I conclude that plaintiff may proceed on his claims that defendants Burton Cox, Jr. and Jolinda Waterman failed to treat his h. pylori infection for more than two years, in violation of the Eighth Amendment. However, I am dismissing his claims with respect to the remaining defendants.

OPINION

Plaintiff's claims for inadequate medical care arise under the Eighth Amendment. A prison official may violate this right 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," Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), 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).

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

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

Plaintiff's allegations against defendants Cox and Waterman are sufficient to state a claim upon which relief may be granted. Plaintiff says that Cox and Waterman are health care providers at the Wisconsin Secure Program Facility, where plaintiff is incarcerated. Between 2005 and 2007, he complained to them about various symptoms such as nausea, abdominal pain, vomiting and acid reflux and he asked to be tested for h. pylori bacteria on

multiple occasions. Although eight other prisoners at the facility had been diagnosed with an h. pylori bacteria infection, defendants Cox and Waterman refused to test plaintiff for h. pylori or treat him for it until March 2007, after which it was discovered that he had the infection. From these allegations, it is reasonable to infer that Cox and Waterman knew that plaintiff had a serious medical need but they consciously refused to take reasonable measures to treat the need for more than two years.

Plaintiff also alleges that defendant Waterman failed to respond to an emergency call plaintiff made in September 2006 when he was suffering from acute symptoms such as “stabbing pain” in his chest and vomiting. Waterman later admitted to plaintiff that she was on duty at the time, but she did not respond to the call because she thought it was another prisoner who needed help. The court of appeals has held that an emergency call may be sufficient to trigger a prison staff member’s duty to act under the Eighth Amendment, even if the staff member does not know the particular reason for the call. Velez v. Johnson, 395 F.3d 732, 736 (7th Cir. 2005). Further, because plaintiff alleges that Waterman admitted she knew about the call but failed to respond to it, I may infer at this stage that she disregarded plaintiff’s need for medical treatment. Accordingly, I will allow plaintiff to proceed on this claim as well.

At summary judgment or trial, it will not be enough for plaintiff to show that he disagrees with Cox’s or Waterman’s conclusions about the appropriate treatment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that Cox or Waterman made a mistake. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, plaintiff will have

to show that any medical judgment by Cox or Waterman 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).

Plaintiff's allegations against the remaining defendants fall short. With respect to defendant Campbell, the only allegation in the complaint against her is that she examined plaintiff once in September 2006 for "epigastric pain," that he asked her whether it could be "from the odor fr. his toilet" and that she gave him almag plus, which is an antacid tablet. Although the medication Campbell gave plaintiff may not have been effective, plaintiff's allegation shows that Campbell did not disregard plaintiff's symptoms; she tried to treat them. Because plaintiff includes no other allegations suggesting that Campbell should have known that he needed additional treatment, he has not stated a claim against her.

With respect to defendants Richard Schneider (the warden), Peter Huibregtse (the assistant warden) and the unnamed manager of the health services unit, plaintiff does not allege that any of them are personally responsible for denying him health care. Rather, he alleges that they were "aware or should have been aware that there was an h. pylori outbreak at WSPF" and they failed to stop it from spreading.

This claim fails for multiple reasons. First, to the extent that defendants "should have known" that other prisoners had become infected, that would not be sufficient to state a claim under the Eighth Amendment. Plaintiff must show that defendants actually knew about the problem. Farmer, 511 U.S. at 843 n.8 ("It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries

should be instructed accordingly."). Second, defendants cannot be held liable unless they were aware of a *substantial* risk that plaintiff would be seriously harmed. Id. at 837. Even if I assume that defendants knew that eight other prisoners had the infection before plaintiff did, this suggests that they were aware of some risk that other prisoners could become infected as well, but it does not necessarily suggest that they were aware of a substantial risk. Brown v. Budz, 398 F.3d 904, 911 (7th Cir. 2005) ("substantial" risks are "so great that they are almost certain to materialize if nothing is done"). Finally, plaintiff does not identify any reasonable measures defendants could have taken to prevent other prisoners such as him from getting the infection. Accordingly, I am dismissing the complaint as to these three defendants.

ORDER

IT IS ORDERED that

1. Plaintiff Glenn Turner is GRANTED leave to proceed on his claims that:
 - (a) defendants Burton Cox, Jr. and Jolinda Waterman refused to treat plaintiff's *h. pylori* infection from 2005 to 2007, in violation of the Eighth Amendment; and
 - (b) defendant Waterman failed to respond to plaintiff's emergency call in September 2006, in violation of the Eighth Amendment.
2. Plaintiff's claims against defendants Ms. Campbell, Richard Schneiter, Peter Huibregtse and John/Jane Doe are DISMISSED for plaintiff's failure to state a claim upon which relief may be granted.

3. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of their documents.

5. Pursuant to 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 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 for defendants.

6. Plaintiff is obligated to pay the unpaid balance of his filing fees 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 fees have been paid in full.

Entered this 14th day of September, 2012.

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