

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

ALAN DAVID McCORMACK,

Plaintiff,

v.

BUREAU OF HEALTH SERVICES,
DAVID BURNETT, JAMES LABELLE,
RENEE SCHUELER, KAREN GOURLIE,
and WELCOME F. ROSE,

Defendants.

OPINION AND ORDER

12-cv-925-bbc

In this proposed civil action, plaintiff Alan David McCormack contends that defendants Bureau of Health Services, David Burnett, James LaBelle, Renee Schueler, Karen Gourlie and Welcome Rose violated his rights under the Eighth Amendment by depriving him of adequate medical care for his umbilical hernia while he was incarcerated. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made his initial partial payment as required by 28 U.S.C. § 1915(b)(1).

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).

Having reviewing the complaint, I conclude that defendant Bureau of Health Services must be dismissed because it cannot be sued under § 1983 but that plaintiff may proceed on his Eighth Amendment claims against the remaining defendants.

Plaintiff has alleged the following facts.

ALLEGATIONS OF FACT

Plaintiff Alan David McCormack is incarcerated at the Fox Lake Correctional Institution. Defendant Bureau of Health Services is a subdivision of the Wisconsin Department of Corrections. Defendant David Burnett is the medical director of the Bureau of Health Services. Defendant James LaBelle is a registered nurse. Defendants Renee Schueler, Karen Gourlie and Welcome Rose are inmate complaint examiners.

Plaintiff suffers from an umbilical hernia that causes him daily pain and discomfort. The condition will not heal on its own and will worsen progressively as he ages. Surgery is the only medical treatment that will correct plaintiff's condition. Plaintiff has been seen by an attending physician, Dr. Larson, who recommended surgery to repair the hernia. Larson's medical opinion is that surgery is needed to repair the hernia and that, left untreated, the hernia will result in increased risk of serious injury.

Larson filed a medical report seeking approval for the surgery, informing Burnett and LaBelle that Larson "strongly recommended surgical repair" for plaintiff's hernia. Without speaking with or examining plaintiff, Burnett and LaBelle determined that plaintiff's

condition was not affecting his “average daily living” and did not approve the surgery. Larson’s report did not mention whether plaintiff’s hernia affected his “average daily living.”

Plaintiff filed inmate complaints about his umbilical hernia, which were reviewed by defendants Schueler, Gourlie and Rose. They denied his complaints without “conduct[ing] any investigations or interviews.”

OPINION

A. Proper Parties

“A cause of action under [42 U.S.C.] § 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). State agencies like the Bureau of Health Services are not “persons” within the meaning of § 1983 and thus are not subject to suit. Ryan v. Illinois Dept. of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999) (holding that state agency was not a “person” under § 1983); Witte v. Wisconsin Dept. of Corrections, 434 F.3d 1031, 1036 (7th Cir. 2006) (affirming dismissal of Wisconsin Department of Corrections because it is not a “person” under § 1983). Accordingly, I will dismiss defendant Bureau of Health Services.

B. Eighth Amendment Claim

Plaintiff contends that defendants violated his rights under the Eighth Amendment by refusing to approve his hernia surgery. 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 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). 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). 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. For a medical professional, deliberate indifference may be inferred when “the medical professional's

decision is such a substantial departure 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).

Plaintiff alleges that he suffers from an umbilical hernia that causes him daily pain and that his treating physician has recommended surgical repair. At this early stage, this is sufficient to allege a serious medical need. Gonzalez v. Feinerman, 663 F.3d 311 (7th Cir. 2011) (chronic pain from hernia satisfies “serious medical problem” standard) (citations omitted). In addition, plaintiff alleges that his treating physician filed a medical report seeking approval for the surgery but defendants Burnett and LaBelle refused to approve the surgery. Instead, they determined that plaintiff’s condition did not affect his activities of daily living despite the absence of anything in the treating physician’s report to support this determination and without speaking with or examining plaintiff. These allegations are sufficient to suggest that defendants Burnett and LaBelle acted with deliberate indifference. Arnett v. Webster, 658 F.3d 742, 753 (7th Cir. 2011) (refusal to follow prescribed treatment can state claim for deliberate indifference); Gonzalez, 663 F.3d at 315 (two-year delay in treating painful but not life-threatening hernia stated claim for deliberate indifference).

The remaining defendants, Schueler, Gourlie and Rose, are inmate complaint examiners and not medical personnel. Security and administrative personnel are generally entitled to rely on the professional judgment of medical personnel, but they may be found deliberately indifferent if “they have ‘a reason to believe (or actual knowledge) that prison

doctors or their assistants are mistreating (or not treating) a prisoner.’” Hayes v. Snyder, 546 F.3d 516, 525 (7th Cir. 2008) (quoting Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004). See also Arnett, 658 F.3d at 755. Because plaintiff alleges that defendants Schueler, Gourlie and Rose denied his grievances related to the hernia without performing any investigation, he may proceed on his deliberate indifference claims against these defendants as well.

ORDER

IT IS ORDERED that

1. Plaintiff Alan David McCormack is GRANTED leave to proceed on his claims that defendants David Burnett, James LaBelle, Renee Schueler, Karen Gourlie and Welcome F. Rose violated his rights under the Eighth Amendment.

2. Plaintiff is DENIED leave to proceed on his claims against defendant Bureau of Health Services, which is DISMISSED from the case.

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 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 their 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.

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 19th day of March, 2013.

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