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

MELVIN ANDERSON,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, WARDEN JEFFREY PUGH, DR. JOHN DOE, DR. HEINZL, NURSE WARNER, NURSE PRELL, and DR. CORNELL,

Defendants.

OPINION AND ORDER

12-cv-684-wmc

Over the past seventeen years, plaintiff Melvin Anderson has been incarcerated at four different Wisconsin state prisons and treated for a variety of distinct health problems at various times. Anderson contends that most or all of his health issues are the result of improper treatment while incarcerated. Accordingly, Anderson brings this action against the Wisconsin Department of Corrections, one of its wardens and various medical staff, asserting claims under 42 U.S.C. § 1983 for violations of his Eighth Amendment rights, the Americans with Disabilities Act, and Wisconsin medical malpractice tort law.

Because Anderson was incarcerated at the time he filed suit, this court must screen the merits of his complaint and dismiss any aspect of the complaint that (1) is legally frivolous or malicious, (2) fails to state a claim upon which relief may be granted, or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. After examining the complaint, the court concludes that Anderson may only proceed in this lawsuit on one of two distinct claims involving health problems and

alleged mistreatments by different defendants at different facilities at different periods of time. Fed. R. Civ. P. 20. Anderson must decide on which of these two discrete claims he wishes to proceed in this lawsuit and whether he wishes to proceed on the other claim in a separate lawsuit. Finally, the court will deny his request for a preliminary injunction for reasons explained below.

## ALLEGATIONS OF FACT

### A. Background

In addressing any pro se litigant's complaint, the court must read the allegations generously, holding the complaint "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Accordingly, the court draws all facts from a generous reading of the allegations in plaintiff's complaint and attachments to his complaint. *Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) ("Attachments to the complaint become part of the complaint and the court may consider those documents in ruling on a motion to dismiss.").

Even with the aid of the attached documents, however, Anderson's complaint is barely intelligible. From what little the court can make out, Anderson appears to have two *potentially* legitimate claims for Eighth Amendment violations. In the interests of addressing those claims on their merits, the court characterizes Anderson's various complaints as best it can. Any other allegations or claims not specifically addressed in this opinion should be considered barred from proceeding on grounds that they are too undeveloped even to pass screening. To the extent the court has overlooked or

misconstrued some aspect of Anderson's claims, he may wish to file a separate lawsuit with the required specificity, necessary additions and clarifications. Absent further order of this court, however, the numbered facts identified below will stand as the operative set of alleged facts going forward (i.e., the facts to which defendants must respond in their answer).

**B. Complaints**

***1. Periods and Location of Incarceration.*** At the time plaintiff Melvin Anderson filed his complaint, he was confined in the Oakhill Correctional Institution, in Oregon, Wisconsin. He was released from state custody on December 11, 2012. (Dkt. ##9-11.) Anderson had been incarcerated by the Wisconsin Department of Corrections for seventeen years. As of at least 2000, Anderson was confined in the Oshkosh Correctional Institution ("OSCI"). In 2003, he was transferred to the Stanley Correctional Institution ("SCI"). At some later point, he was transferred to New Lisbon Correctional Institution ("NLCI"). On July 14, 2010, he was transferred to Oakhill Correctional Institution ("OCI").

***2. Denial of a Job at New Lisbon Due to Disability.*** While incarcerated at NLCI, Anderson was denied prison employment because of his (unnamed) disability.

***3. Travel in a Disability-Unfriendly Van.*** While incarcerated at OCI, Anderson had to travel as a passenger in a prison van to off-grounds medical appointments. On one occasion, the van used was not handicap-accessible, so Anderson had to crawl through the van on his hands and knees in order to reach his seat.

***4. Hydrocele.*** In 2000, Anderson asked Dr. Kaplan, a medical officer at OSCI, to treat a boil on his scrotum. Kaplan lanced the boil and scar tissue buildup from the ensuing infection prevented fluid from exiting Anderson's scrotum, creating what is known as a hydrocele (a fluid-filled sack in the scrotum). When Anderson's testicular area swelled up to the size of a bird's egg, Warden Judy Smith ordered him to be taken to the University of Wisconsin hospital, where the hydrocele was diagnosed but not operated upon or otherwise treated. In 2003, Anderson was transferred to SCI, where his requests for treatment of the hydrocele were ignored by a Dr. "John Doe."[1] By 2006, the hydrocele had swelled to the size of a baseball. Anderson wrote to the Wisconsin Department of Health Services requesting medical treatment, and was taken back to the UW Hospital for an ultrasound but was not operated upon. At that point, the hydrocele was so large and heavy that it would hang down into the water whenever he would sit on a toilet seat. The officials at SCI said that because the hydrocele did not appear to be

[1] For the sole purpose of allowing plaintiff to discover the identity of Dr. John Doe, the court has substituted as nominal defendant Jeffrey Pugh, Warden of SCI. *See Duncan v. Duckworth*, 644 F.2d 653, 656 (7th Cir. 1981) (suggesting that naming a senior prison official is appropriate "to insure that those more directly involved will be identified"). Anderson may proceed against Pugh in his official capacity only. Upon receipt of this order and a notice of appearance by an attorney on behalf of defendants, Anderson should promptly use discovery to identify the Dr. Doe. When he has learned his identity, Anderson should move to amend his complaint to name him specifically and to remove Mr. Pugh as a defendant. If necessary, at the preliminary scheduling conference, Magistrate Judge Stephen Crocker can provide a further explanation on what Anderson must do. If Anderson is unsuccessful in his attempts to identify Dr. Doe, the court will assist him in doing so. *See Donald v. Cook Cnty. Sheriff's Dep't*, 95 F.3d 548, 555 (7th Cir. 1996) ("To the extent the plaintiff faces barriers to determining the identities of the unnamed defendants, the court must assist the plaintiff in conducting the necessary investigation."). Accordingly, if Anderson makes a good faith attempt to discover the name(s) of "Dr. Doe" and is still unable to identify him, then Anderson should so advise the court.

infected no surgery would be authorized. Anderson then asked for a toilet seat riser, but did not receive one for four months.

When Anderson was transferred to NLCI, he requested corrective surgery from Dr. Heinzl, but was denied. At OCI, he was given a seat riser. At that point, it appears that he did not request any further treatment for the hydrocele.

***5. Hearing Aid.*** While at SCI, Anderson was prescribed hearing aids for both ears. Prison officials only allowed him to have one hearing aid. When he lost this hearing aid, it was never replaced.

Anderson later arrived at OCI, where his hearing was again tested and he was told that he did not qualify for a hearing aid. When Anderson complained, he was sent for testing outside the prison and was again told he needed a hearing aid for each ear. As before, however, the Department of Corrections allowed him only one.

The new hearing aid they sent gave him an ear infection within the first four days of use. Anderson was seen by Nurse Todd, who prescribed ear drops for the infection, and Anderson was not able to wear the hearing aid for three weeks. When he put the hearing aid back in, the ear became infected again. Health staff suggested some steps he might take to adjust to the hearing aid, but the cycle of infection and treatment persisted. The plastic in the hearing aid was remolded twice, all to no avail. Anderson then asked if he could have the original type of hearing aid that he used at SCI, but Nurse Ann Farley refused.

***6. Medications That Cause Swelling of the Throat.*** Anderson has restrictive airway disease (a general term for conditions involving wheezing and allergic reactions). Some of the medications prescribed to him in prison cause his throat to swell.

***7. Leg Sores.*** Anderson suffers from peripheral artery disease (a circulatory problem in which narrowed arteries reduce blood flow to the limbs). In 2005, Anderson developed an infection on his right calf. He later developed a similar infection on his left calf. Anderson regularly rubbed these sores until they would puss and bleed. When he arrived at OCI, he was seen by Nurse Kemp, who applied an antibiotic medication, Bacitracin. When this treatment did not work, Kemp refused to send a sample of the infection to the lab as she had promised. Anderson was, however, taken to the University of Wisconsin Hospital for treatment. The hospital refused to do a biopsy and its treatment plan has made the leg worse. Anderson's medical care providers at OCI identified the sores as stasis ulcers resulting in fluid buildup in the skin and stated that a biopsy is not necessary for treatment.

***8. CPAP Mask and Humidifier.*** In late 2007, when Anderson was at NLCI, Dr. Heinzl purchased a continuous positive air pressure "CPAP" machine for Anderson's use. The mask was too small and it rubbed a sore spot on his nose. He requested a larger mask but was not provided one. As a result, Anderson was unable to use (or at least properly use) the CPAP machine. Without the machine, sleeping was difficult and Anderson's brain was deprived of oxygen, causing serious harm. In January of 2008, Anderson was fitted with a mask with replaceable gel elements that needed to be changed every 30 days. However, Nurses Warner and Prell refused to replace these elements.

Upon transfer to OCI in July, 2010, Anderson was initially given a CPAP mask, but it was taken away from him for four months. In December, 2011, he received a different face mask with altered construction. The new mask no longer fit his face, and he was unable to sleep well after that. Dr. Cornell, who treated Anderson at OCI, refused to address this problem.

***9. Heart Surgery and Function.*** In 2004, Anderson underwent an operation at the hands of Dr. Charles Stone to correct an arterial blockage. Stone unblocked one artery, but not the other, and repeatedly lied about stress test results.

On August 5, 2010, Anderson suffered a heart attack, and was sent to the University of Wisconsin hospital for treatment. A stent was placed into one of his arteries to open up the blockage that Stone had not treated. The heart attack caused by this blockage temporarily deprived Anderson's heart muscle of blood or oxygen. As a result, the right side of his heart died. Anderson is now considered to be terminally ill.

Shortly after his heart attack, Anderson was transferred to OCI. Nurse Kemp switched Anderson from the heart medication Lovastatin to Atorvastatin. Anderson explained that he could not take Atorvastatin because of its (unnamed) bad side effects and demanded Lovastatin. Ms. Farley had ordered the health clinic to stop offering Lovastatin, so his demands were rejected.

OPINION

## I. Applicability of Statutes of Limitations at the Screening Stage

Although the expiration of statutes of limitations is an affirmative defense generally left for defendants to asset, a court may dismiss as "frivolous" at the screening stage any cause of action that clearly is time-barred on its face. *Jones v. Bock*, 549 U.S. 199, 215 (2007). For § 1983 claims, federal courts must apply the general personal injury statute of limitations of the state where the deprivation of rights occurred, making the relevant statute of limitations six years under Wisconsin law. *Gray v. Lacke*, 885 F.2d 399, 407-08 (7th Cir. 1989). For state law medical malpractice actions, the statute of limitations is "the later of: (a) [t]hree years from the date of the injury, or (b) [o]ne year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that an action may not be commenced . . . more than 5 years from the date of the act or omission." Wis. Stat. § 893.55(1m). Finally, for state tort actions relating to personal injury the statute of limitations is three years. Wis. Stat. § 893.54.

From the complaint, Anderson left OSCI as early as 2003 or as late as 2005. (Complaint (dkt. #1) at 5.) Moreover, there is no suggestion that any of the injuries he suffered during this period could not have been promptly discovered with reasonable diligence. Thus, all claims against defendants for actions while Anderson was incarcerated at OSCI are time-barred and can be dismissed out of hand.

**II. Eighth Amendment Deliberate Indifference Claims**

The Eighth Amendment's prohibition against cruel and unusual punishment means that prison officials "must provide humane conditions of confinement . . . [and] must take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotations omitted). An official violates the Eighth Amendment if he acts with "deliberate indifference" to a prisoner's exposure to a "substantial risk of serious harm." *Id.* at 834. A violation occurs when (1) the inmate suffers an objectively intolerable risk of serious harm; and (2) the official knows of the substantial risk of harm and intentionally fails to take reasonable steps to remedy it. *Id.* Thus, prison officials must not ignore inmates' serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

A serious medical need is (1) "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention"; or (2) in another acceptable formulation, is one in which "'the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.'" *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997) (internal quotation marks and citations omitted).

Thus, depending on the circumstances, a prison doctor may exhibit deliberate indifference even in the course of actually treating a prisoner by consciously choosing "the 'easier and less efficacious treatment'" where a more effective remedy is reasonably available. *Estelle v. Gamble*, 429 U.S. 97, 105, n.10 (1976) (quoting *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974)). Although mere negligence is not enough to create

deliberate indifference, a consistent pattern of negligence over years may create an inference of "intentional" negligence, which itself is a kind of deliberate indifference. *Kelley v. McGinnis*, 899 F.2d 612, 617 (7th Cir. 1990). Here, Anderson claims defendants have been deliberately indifferent to a variety of his serious medical needs over time.

**A. Hydrocele**

Anderson has had a hydrocele for over twelve years, during which time he was twice seen at the University of Wisconsin Hospital, but never operated upon or offered full treatment to make the swelling in his scrotum recede. Anderson alleges that he was refused the option of corrective surgery by Dr. John Doe at SCI and Dr. Heinzl at NLCI.

For screening purposes, the court will assume that Anderson's swollen scrotum (which at times is alleged to have swollen to the size of a baseball) is the sort of malady that a reasonable doctor would not hesitate to treat. Accordingly, the alleged failure of the above-named defendants to offer or authorize treatment would appear to state a viable claim for deliberate indifference to a serious medical need. Anderson's claims for damages on this claim against these defendants may proceed. At least as presently alleged, however, Anderson may not proceed on his claim against any defendant at OCI because he does not allege requesting any treatment for his hydrocele there, beyond asking for a seat riser.

**B. Hearing Aid**

Anderson has two complaints about denial of a proper hearing aid. First, he is unhappy that he was only prescribed an aid for one ear rather than two. This does not amount to deliberate indifference. While total inability to hear is likely a serious medical need,[2] the failure to provide aid for full hearing capability in *both* ears is not, at least absent allegations that lack of bi-aural hearing (1) caused Anderson significant pain, *Cooper v. Casey*, 97 F.3d 914, 916-17 (7th Cir. 1996); (2) substantially interfered with his daily activities, *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997); or (3) otherwise subjected him to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Accordingly, the court finds that Anderson has not stated a cognizable legal claim with regard to hearing aids.

Anderson's other complaint is that the new model of hearing aid given to him at OCI was unusable because it caused persistent earaches and infections. Still, Anderson concedes that staff at OCI went to great lengths to treat his ear infections and to adjust his existing aid, including sending it back twice for re-molding of the plastic. The only thing that Nurses Todd and Farley apparently failed to do is buy him a replica of the old model he successfully used before arriving at OCI. Given the other steps Anderson concedes defendants Todd and Farley undertook to try to make the new hearing aid suitable for Anderson, the court does not find that the alleged facts would permit a reasonable trier of fact to find deliberate indifference.

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[2] *See Newman v. Alabama*, 503 F.2d 1320, 1331 (5th Cir. 1974) (failure to provide eyeglasses and prosthetic devices can constitute deliberate indifference).

**C. Medication Allergy**

Anderson complains that some of the medication that he has been prescribed in the past caused his throat to swell. To allege the basic facts of a deliberate indifference claim, a plaintiff must demonstrate (1) a serious medical need and (2) a state official's knowledge of and indifference to this need. His bare-bones claim regarding these medications meets neither of those criteria.

**D. Sores**

Anderson alleges that he suffered from itchy and painful sores on his legs and that Nurse Practitioner Kemp inadequately treated them. Even assuming the sores produce chronic and substantial pain, or some other interference with daily life that rises to the level of a serious medical need, the complaint and attached documents demonstrate that prison officials consistently offered treatment and advice for his condition. While Anderson seems to be fixated on the fact that doctors did not conduct a biopsy on the sore tissue, the medical documents attached to the complaint indicate that failure to do so was the product of a considered medical opinion, rather than the result of hostility or indifference. To the extent the treatment provided may have been medically incorrect, it does not support a finding of deliberate indifference to Anderson's medical needs.

**E. CPAP Mask**

Anderson also complains that he was effectively denied use of an allegedly medically-necessary. continuous positive air pressure (CPAP) machine for months at a

time because prison officials actively took away his mask or provided him with a mask that would not fit properly. Although Anderson does little more than state that denial of the machine gave him fitful sleep and deprived him of oxygen -- and does not elaborate on the extent to which the machine is truly medically necessary -- Anderson has plead enough to permit a finding that he suffered from a serious medical need, at least for screening purposes. *See Meloy v. Bachmeier*, 302 F.3d 845, 847 (8th Cir. 2002) (suggesting that access to a CPAP machine can be a serious medical need). Anderson has also alleged enough to find that Dr. Heinzl and nurses Warner and Prell at NLCI, as well as Dr. Cornell at OCI, knew of his need and did not act (or acted so slowly) to permit a finding of deliberate indifference. Anderson may, therefore, proceed on this claim against these defendants.

**F. Heart Surgery**

Anderson has two heart-related complaints. The first is that a Dr. Charles Stone botched his heart operation in 2004 and failed to treat him properly in the ensuing years. However, Anderson has no § 1983 claim against Stone -- who does not appear to be a prison doctor -- if for no other reason than that he fails to allege (or even create the inference that) Stone was acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 50 (1988) ("The traditional definition of acting under color of state law requires that the defendant . . . exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.").

Anderson's other claim is that prison nurses at OCI have switched him to a different heart medication, Atorvastatin, away from his usual Lovastatin. Anderson's complaint about Atorvastatin is that it produces unpleasant side effects. Because Anderson does not name the side effects, however, the court is unable to conclude that the switch exposed him to significant risk of serious harm. Notably, he does not allege that Atorvastatin is materially less effective at treating his heart disease. Accordingly, this claim may not proceed.

**III. State Law Medical Malpractice Claims**

Anderson also claims that various defendant doctors and nurses committed medical malpractice in the course of providing (or failing to provide) him with medical care. Wisconsin law defines medical negligence (malpractice) as the failure of a medical professional to "exercise that degree of care and skill which is exercised by the average practitioner in the class to which he belongs, acting in the same or similar circumstances." *Sawyer v. Midelfort*, 227 Wis.2d 124, 149, 595 N.W.2d 423, 435 (1999). Unlike Anderson's Eighth Amendment deliberate indifference claims, these claims rest only on state law and, therefore, absent diversity of citizenship between the parties, may only be considered by a federal court by exercise of its "supplemental jurisdiction."

A federal district court has

> supplemental jurisdiction over all other claims that are so related to claims in the action within such 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). Accordingly, this court will only exercise supplemental jurisdiction over those medical malpractice claims concerning the same injuries for which the court has granted Anderson leave to proceed on an Eighth Amendment deliberate indifference claim.

Turning to the medical malpractice claims, at the screening stage, the court looks to see if Anderson has pled the basic elements of a malpractice claim: (1) a breach of (2) a duty owed (3) that results in (4) injury or injuries, or damages. *Paul v. Skemp*, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (2001) (*citing Nieuwendorp v. American Family Ins. Co.*, 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995)). Reading the complaint very generously, it appears that in the course of alleging facts in support of his claims for deliberate indifference, Anderson may also have alleged grounds for malpractice or negligence claims against various prison nurses and doctors. Accordingly, he may proceed against: (1) Dr. John Doe at SCI, and Dr. Heinzl at NLCI with respect to his hydrocele; and (2) Dr. Heinzl and nurses Warner and Prell at NLCI, and Dr. Cornell at OCI, with respect to his CPAP machine and mask.

For the reasons explained above, however, Anderson may not proceed with a negligence or malpractice claim against Nurse Practitioner Kemp with respect to his leg sores or against Dr. Charles Stone with respect to his heart surgery, because these claims are not related to the specific Eighth Amendment claims on which Anderson will be allowed to proceed. *See* 28 U.S.C. § 1367; *see also* Fed. R. Civ. P. 20(a)(2)(A) ("Persons . . . may be joined in one action as defendants if: [] any right to relief is asserted against

them . . . arising out of the same transaction, occurrence, or series of transactions or occurrences.").

**IV. ADA and Rehabilitation Act Claims**

Anderson also claims that he was discriminated against on the basis of his disability, invoking the protection of the Americans with Disabilities Act. While Congress has abrogated states' Eleventh Amendment sovereign immunity for ADA violations that also constitute federal constitutional violations, it is unsettled law in this Circuit whether ADA violations that do not implicate constitutional rights may be brought in federal court. *Norfleet v. Walker*, 684 F.3d 688, 690 (7th Cir. 2012). In circumstances where an ADA claim is questionable and a *pro se* plaintiff has failed to invoke the roughly parallel provisions of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, the Seventh Circuit has suggested reading in a claim under the Rehabilitation Act so as to avoid this tricky abrogation question. *Id.* Accordingly, that is what this court will do.

The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A claim under § 504 of the Act has four elements: (1) an individual with a disability; (2) otherwise qualified for the benefit sought; (3) discriminated against solely by reason of disability; and (4) the program or activity receives federal financial assistance. *Grzan v. Charter Hosp. of Nw. Ind.*, 104 F.3d 116, 119 (7th Cir. 1997).

From the vague allegations in the complaint, it is unclear exactly what disability Anderson has, except he seems to allege an inability to walk. This obviously would qualify as a "disability" under the Act. 29 U.S.C. § 705(9)(B); 42 U.S.C. § 12102(2)(A) ("major life activities include, but are not limited to . . . walking, standing, lifting . . . ."). In addition, Anderson alleges two specific violations of the Act: (1) that on one occasion, he was forced to ride to an out-of-prison appointment in a van that was not handicapped-accessible; and (2) that he was denied a prison job at NLCI because of his disability. Of these two complaints, the first cannot survive screening.

Even if true, the allegation that defendants failed to provide a handicap ramp or step for entry into a prison van does not establish a cause of action under the Rehabilitation Act. Being forced to crawl up into a van without assistance on one occasion, while seemingly inexcusable, likely uncomfortable and embarrassing, even demeaning, was not a denial of a prison program or activity. As alleged, Anderson ultimately made it into the van and got where he needed to go. This is not to say OCI has no duty to accommodate disabled prisoners, because at some point an accumulation of inconveniences turns into a *de facto* denial of opportunities. However, this one-time hardship does not qualify as the sort of exclusion or denial targeted by the Rehabilitation Act, at least as alleged. *See Kiman v. N.H. Dep't. of Corr.*, 451 F.3d 274, 284-85 (1st. Cir. 2006) (under comparable provisions of the ADA, prisoner deprived of cane was not denied access to programs, services, or activities where defendants said they would have helped him to attend if he had asked and doctor wrote a pass to allow him to have recreation in day room instead of outside).

As for Anderson's second claim -- that he was denied a prison job at NLCI because of his disability -- this claim also passes screening. Participation in a prison job can have a variety of benefits, both remunerative and rehabilitative, and Anderson was entitled to participate in this program on an equal basis with other prisoners if a reasonable accommodation were possible. Moreover, even if none of the available prison jobs would have suited a person with Anderson's disability, NLCI was required by the ADA to make reasonable accommodations for him. *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 n.17 (1987).

The complaint suggests that NLCI staff was unwilling to make such accommodations, and instead flatly refused to allow participation in the prison work program, thereby discriminating solely on the basis of Anderson's disability. Although Anderson does not allege it, the court also takes judicial notice of the fact that the Wisconsin Department of Corrections receives federal financial assistance and is thus subject to the terms of the Rehabilitation Act. *Flynn v. Doyle*, 672 F. Supp. 2d 858, 878 n.2 (E.D. Wis. 2009) ("It is undisputed that DOC receives and uses federal funds in its state prison facilities." (quoting *Smith v. Frank*, No. 07-C83, 2009 WL 750272, *6 n. 1 (E.D. Wis. March 20, 2009))).

Accordingly, Anderson may proceed on his Rehabilitation Act claims against NLCI, but not against OCI. Because the Wisconsin Department of Corrections is the proper defendant for this purpose, the court will also add it as a party and has included it in the case caption.

**V. Rule 20**

Unfortunately, Anderson's Rehabilitation Act claim is an entirely separate claim from his deliberate indifference claims and against a different defendant. The Court of Appeals for the Seventh Circuit has emphasized that district courts have an independent duty to apply the permissive joinder rule in Fed. R. Civ. P. 20 to prevent improperly joined parties or claims from proceeding in a single case. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (holding that complaint raising unrelated issues against different defendants "should be rejected" by district court in accordance with Rule 20). Rule 20(a) prohibits a plaintiff from asserting unrelated claims against different defendants in the same lawsuit, unless (1) the plaintiff asserts at least one claim against each defendant arising out of the same transaction or series of transactions; and (2) the action presents a question of law or fact common to all of the defendants. Fed. R. Civ. P. 20(a); *George*, 507 F.3d at 607. If both requirements of Rule 20(a) are satisfied, then a plaintiff may join as many additional, unrelated claims as he has against those defendants. Fed. R. Civ. P. 18(a); *Intercon Research Ass'n, Ltd. v. Dresser Ind., Inc.*, 696 F.2d 53, 57 (7th Cir. 1983). A plaintiff may not, however, use Rule 18(a) to join claims against additional defendants outside the "core group" identified in Rule 20(a).

As such, Anderson must decide if he wishes to proceed in this lawsuit with: (1) his claims against the individual defendants for deliberate indifference and malpractice; *or* (2) his claim that the Wisconsin Department of Corrections denied him a prison job at NLCI in violation of the Rehabilitation Act. This is not to say he must drop the other claim, but if he also wishes to pursue that claim, it will be assigned a new, separate case

number only after he either pays the full filing fee or files a separate motion for leave to proceed *in forma pauperis*. Anderson will have 21 days from this order to inform the court on which claim he wishes to pursue in this lawsuit. Alternately, Anderson may choose to drop the other claim voluntarily and will not owe any additional filing fee or face a potential strike. Any claim dismissed voluntarily would also be without prejudice, so Anderson may be able to bring it at another time provided the statute of limitations has not expired.

**VI. Motion for Preliminary Injunction**

Finally, Anderson moves for a preliminary injunction, asking that the court (1) appoint an independent cardiologist to provide care and treatment for his heart condition, and (2) order that the OCI defendants (Dr. Cornell and Nurses Kemp, Farley and Todd) provide him with adequate care. (Dkt. #2.) This request is rendered moot by the fact that plaintiff is no longer incarcerated.

ORDER

IT IS ORDERED that:

(1) Plaintiff Melvin Anderson' motion for leave to proceed on his Eighth Amendment and Wisconsin medical malpractice claims for damages is preliminarily GRANTED with respect to:

   a. his hydrocele, against defendants Dr. John Doe at SCI and Dr. Heinzl at NLCI; and

   b. his CPAP mask, against defendants Dr. Heinzl and nurses Warner and Prell at NLCI, and Dr. Cornell at OCI.

(2) Plaintiff's motion for leave to proceed on his Rehabilitative Act claim for damages against the Wisconsin Department of Corrections based on denial of a job assignment based on his disability is also preliminary GRANTED at this time.

(3) No later than November 5, 2013, Anderson must inform the court (a) which of these two preliminarily screened claims (as set forth in (1) and (2) above, he wishes to pursue in this lawsuit, and (b) whether he wishes to pursue the other claim at this time. If Anderson wishes to pursue both claims, he must either pay the full $350 filing fee or file a motion for leave to proceed *in forma pauperis* in the second action.

(4) If plaintiff fails to respond to this order by November 12, 2013, then the clerk is directed to enter an order dismissing without prejudice all claims based on plaintiff's failure to prosecute them.

(5) Should he choose to pursue his Eighth Amendment and malpractice claims, plaintiff is also *sua sponte* GRANTED leave to proceed against the Warden of Stanley Correctional Institution, Jeffrey Pugh, in his official capacity only, for the sole purpose of determining the identity of the Dr. John Doe defendant in this action.

(6) Plaintiff Melvin Anderson's motion for leave to proceed on his Eighth Amendment claim for injunctive relief is DENIED.

(7) Plaintiff's motion for a preliminary injunction (dkt. #2) is DENIED as moot.

Entered this 15th day of October, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge