

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

SOLOMON R. GRAVES, JR.,

Plaintiff,

OPINION AND ORDER

v.

12-cv-450-wmc

DR. KENNETH ADLER, *et al.*,

Defendants.

Plaintiff Solomon R. Graves, Jr., brings this proposed civil action under 42 U.S.C. § 1983, alleging that the defendants wrongfully denied him surgery for his injured finger. Graves has been found eligible for indigent status and he has made an initial payment toward the full filing fee for this lawsuit as required by the Prison Litigation Reform Act (the “PLRA”), 28 U.S.C. § 1915(b)(2). Having filed a motion for appointment of counsel, a motion for summary judgment in his favor, and a motion to amend the complaint, Graves seeks leave to proceed.

Because Graves is incarcerated, the PLRA requires the court to determine whether the proposed action is legally frivolous or 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 examining the original and the amended version of his complaint, the court concludes that this case must be dismissed because Graves fails to state a viable claim under 42 U.S.C. § 1983.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's pleadings, the court must construe the allegations generously, and hold the complaint "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court accepts plaintiff's well-pleaded allegations as true and assumes the following probative facts.¹

At all times relevant to this proposed civil action, Graves has been incarcerated by the Wisconsin Department of Corrections ("WDOC") at the Columbia Correctional Institution ("CCI") in Portage. The sole defendant identified in the original complaint is Dr. Kenneth Adler, who is employed as a physician at CCI by the WDOC Bureau of Health Services. The amended complaint adds several other defendants, including three physicians (Dr. Dalia Suliene, Dr. Elliot Wagner, and Dr. Fern Spring), a nurse (Joe Reda, R.N.) and two administrators (Warden Michael Meisner and Health Services Unit Manager K. Anderson), all of whom are employed by WDOC at CCI.

In early January 2012, Dr. Suliene treated Graves in the Health Services Unit ("HSU") for an injury to his left "pinky finger." At Dr. Suliene's request, an x-ray was taken of the fingers on Graves' left hand. The radiologist (Dr. Wagner) observed a recent "fracture" of the "left fifth finger," but "no significant displacement." A splint was

¹ Graves attaches medical and administrative records to his original complaint and the amended complaint. (Dkts. # 1, # 19). The court draws all facts from those complaints and the attached exhibits, which are deemed part of those pleadings. *See* FED. R. CIV. P. 10(c); *see also* *Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) (explaining that documents attached to the complaint become part of the pleading, meaning that a court may consider those documents in determining whether plaintiff has stated a valid claim).

applied to stabilize Graves' finger and he was prescribed Naproxen for pain.

On January 13, 2012, Graves saw Dr. Smith for a follow-up examination. Graves advised that he was in pain and that this was the fifth injury to his finger since July 2010. Dr. Smith diagnosed a "contracture," meaning that joint stiffness was constricting the range of motion and function of Graves' injured finger. Noting that Graves had injured the same finger previously, Dr. Springs requested an evaluation for orthopedic surgery. She sent that request to the Medical Director for WDOC in Madison, where it was evaluated by a committee of physicians. The committee denied the request, observing that Graves was "functioning all right" and that surgery was "unlikely to improve" his condition or prevent further injury. Dr. Adler, as head of that committee, signed the report on January 17, 2012.

On February 23, 2012, Graves submitted a Health Services Request form, inquiring whether surgery had been approved for his injured finger. On February 27, Dr. Suliene replied that the request for surgery was "not approved." On February 29, Graves challenged the decision "not to conduct surgery" on his injured finger by filing a grievance through the Inmate Complaint Review System. His complaint was dismissed at each step of the administrative review process, which included a finding by the Bureau of Health Services that there was no information in the record that would warrant overturning the challenged decision.

On June 26, 2012, Graves filed a complaint pursuant to 42 U.S.C. § 1983, alleging that Dr. Adler's decision to deny "left hand pinky surgery" violated his constitutional right to receive proper medical care. While Graves continues to receive

Naproxen for pain, he maintains that surgery is required because the prescribed medication has not sufficiently alleviated the lingering pain from his finger injury.² Graves contends, therefore, that he has been denied surgery for his injured finger in violation of his constitutional rights. Graves seeks injunctive relief in the form of a court order, directing prison officials to approve the surgery. He also seeks compensatory and punitive damages from each individual defendant.

OPINION

Graves seeks relief pursuant to 42 U.S.C. § 1983, which provides a remedy or private right of action against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” To establish liability under § 1983, a plaintiff must establish that (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) the defendant intentionally caused that deprivation; and (4) the defendant acted under color of state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009); *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989).

² Graves does not allege specific facts showing that any of the individual defendants have denied him adequate pain medication or other kinds of treatment for his recurring finger injury. Moreover, the administrative grievances submitted by Graves in this case reflect that the only issue he raised through the Inmate Complaint Review System concerned the decision by Dr. Adler (or the committee) to deny surgery. (*See* Dkt. # 16). Because it does not appear that Graves exhausted available administrative remedies regarding access to pain medication or forms of treatment other than surgery as required by 42 U.S.C. § 1997e(a), the court addresses only the claim that he was denied surgery to repair his injured finger.

In this case, Graves maintains that the defendants are liable for denying him surgery in violation of the Eighth Amendment. As an initial matter, liability under 42 U.S.C. § 1983 must be based on a defendant's personal involvement in the constitutional violation. See *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). “[A]n official meets the ‘personal involvement’ requirement when ‘she acts or fails to act with a deliberate or reckless disregard of plaintiff’s constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent.’” *Black v. Lane*, 22 F.3d 1395, 1401 (7th Cir. 1994) (quoting *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir. 1985)). Accepting all of Graves’ allegations as true, Dr. Adler is the only defendant who had any personal involvement with the decision to deny surgical intervention. Accordingly, Graves does not state a viable claim against Dr. Suliene, Dr. Wagner, Dr. Smith, K. Anderson, and Nurse Reda.

Turning to the substance of his claims, Graves’ primary allegation — that Dr. Adler wrongfully denied his request for surgery on one of his fingers after a medical diagnosis that such a procedure was “unlikely” to do any good — does not demonstrate a constitutional violation. The constitutional rights of inmates who have been convicted and sentenced to imprisonment are governed primarily by the Eighth Amendment, which prohibits “punishment” that is “cruel and unusual.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official violates the Eighth Amendment’s prohibition against cruel and unusual punishment when his conduct demonstrates deliberate indifference to a prisoner’s serious medical needs, thereby constituting an “unnecessary and wanton

infliction of pain.” *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (quoting *Estelle*, 429 U.S. at 104).

“In order to state a cognizable claim [under the Eighth Amendment], a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Estelle*, 429 U.S. at 106. The Eighth Amendment deliberate-indifference standard has both an objective and subjective component. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To establish deliberate indifference under this standard, the prisoner must demonstrate that the defendants were (1) aware of facts from which an inference of an excessive risk to the prisoner’s health or safety could be drawn, and (2) that they actually drew an inference that such potential for harm existed. *See id.* at 837.

Even assuming that the injury to Graves’ finger was sufficiently serious, he acknowledges that he received medical care on more than one occasion, including an x-ray, a splint and pain medication. At Dr. Smith’s request, Graves was considered for additional treatment by an orthopedic surgeon. Dr. Adler, as chair of a physicians committee, denied the request after noting that the proposed surgery was not likely to improve Graves’ condition or prevent further injury. Graves’ complaint does no more than disagree with the decision to deny surgery because his pain has lingered and he is vulnerable to further injury. But this does not rise to the level of deliberate indifference. Rather, it is a disagreement with how Dr. Adler and the DOC Committee prioritized his need for minor surgery.

Decisions about whether a patient needs surgery or any other particular type of treatment are matters of medical judgment. *Estelle*, 429 U.S. at 107 (noting that “the question whether an [x-ray] or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment.”). Thus, a “medical decision” concerning whether to order surgery here “does not represent cruel and unusual punishment.” *Id.* To the extent that Graves believes the decision was erroneous, this allegation constitutes, at most, medical malpractice. *Id.* Allegations of medical malpractice or negligence do not demonstrate deliberate indifference or implicate a constitutional violation of the Eighth Amendment. *See McGee v. Adams*, — F.3d —, 2013 WL 3944213, *4 (7th Cir. Aug. 1, 2013); *see also Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008) (“Deliberate indifference is not medical malpractice; the Eighth Amendment does not codify common law torts.”); *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005) (“neither medical malpractice nor a mere disagreement with a doctor’s medical judgment amounts to deliberate indifference”).

Accordingly, the complaint, as amended, must be dismissed for failure to state a cognizable claim under 42 U.S.C. § 1983.

ORDER

IT IS ORDERED that:

1. The request for leave to proceed by plaintiff Solomon R. Graves Jr. is DENIED, and the complaint is DISMISSED with prejudice for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983.

2. All pending motions filed by Graves are MOOT.
3. A strike will be assessed for purposes of 28 U.S.C. § 1915g.
4. Graves is obligated to pay the unpaid balance of his filing fee in monthly installments as described in 28 U.S.C. § 1915(b)(2). If one has not issued already, the clerk of court is directed to send a letter to the state prison where plaintiff is in custody, advising the warden of his obligation to deduct payments from plaintiff's inmate trust fund account until the filing fee has been paid in full.

Entered this 6th day of August, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge