

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

IAN DANIEL KOCH,

Plaintiff,

OPINION & ORDER

v.

12-cv-749-wmc

FOND DU LAC COUNTY MEDICAL
STAFF, FOND DU LAC COUNTY JAIL/
SHERIFF'S DEPARTMENT, and JOHN
AND JANE DOES,

Defendants.

Plaintiff Ian Daniel Koch alleges that the above-named defendants all acted with deliberate indifference to his medical needs in violation of the United States Constitution. Koch is eligible to proceed *in forma pauperis* and has made an initial partial payment toward the full filing fee for this lawsuit. *See* 28 U.S.C. § 1915(b)(1). Because Koch is incarcerated, the court must also screen the complaint as required by the Prison Litigation Reform Act ("PLRA"). For the reasons set forth below, the court will now grant Koch leave to proceed under 42 U.S.C. § 1983 with his claim that the individually-named defendants acted with deliberate indifference to his serious medical needs, but will dismiss the claim against the Fond du Lac County Jail/Sheriff's Department and Fond du Lac County Medical Staff, as those entities are not proper defendants under § 1983.

ALLEGATIONS OF FACT

In addressing a *pro se* litigant's pleadings, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For the purposes of this order, the court accepts the plaintiff's well-pled allegations as true and assumes the following facts:

Plaintiff Ian Daniel Koch is currently incarcerated at Green Bay Correctional Institution. At all times relevant to this lawsuit, Koch was incarcerated at the Fond du Lac County Jail.

On February 15, 2012, Koch was injured while “swamping” for the Fond du Lac County Jail. He reported the injury and went to the medical center, where he was told there was nothing wrong with him. Koch continued to ask to see medical and to be taken to the hospital between February 17 and March 9, 2012, but was consistently denied a hospital visit.

On March 8, 2012, Koch fell over in pain and began to vomit blood, at that point too ill to even make it to the toilet. Nevertheless, Koch was still denied a trip to the emergency room. Instead, he was left in his cell lying in his own vomit on the floor and was denied both medical attention and cleaning supplies to clean up the mess.

On March 9, 2012, Koch was taken to an appointment for X-rays. The X-rays revealed that he had appendicitis and needed immediate surgery. He was then taken to the emergency room. Koch contends he was “medically not taken care of by the Fond du Lac medical staff” and that his rights to medical attention were ignored. He now seeks unspecified damages.

OPINION

Section 1983 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.” 42 U.S.C. § 1983. 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). Koch's allegation is that the Fond du Lac County Jail and its medical staff deprived him of his constitutionally-protected right to medical attention, a claim which implicates the Eighth Amendment.

The Eighth Amendment affords prisoners a constitutional right to medical care. *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Accordingly, courts hold that deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment. *Snipes*, 95 F.3d at 590. "Deliberate indifference" means that defendants must have been aware that plaintiff would be at a substantial risk of serious harm but that they disregarded the risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). In addition to demonstrating "deliberate indifference," a prisoner must also show a "serious medical need." A medical need may be "serious" if it is life-threatening or if the delay or denial of treatment "result[s] in needless pain and suffering." *Gutierrez v. Peters*, 111 F.3d 1364, 1371 (7th Cir. 1997).

Based on the law, Koch has stated a claim for deliberate indifference to his serious medical needs. He alleges that he asked to go to the hospital multiple times following his injury, during a period spanning more than two weeks, and that even when he was lying in his cell after having vomited blood, he was denied medical care as well as cleaning supplies. Given the coincidence in time and apparent, growing discomfort over the course of three weeks, it is at least arguably plausible (though quite possibly untrue, given that the original

injury may have had no relationship to Koch's later appendicitis) to infer that medical staff knew of the severity of Koch's injury after the first examination and failed to take any action, even after Koch continued requesting further care. It is even more plausible to infer that medical staff knew of the danger to Koch on March 8, when he was vomiting up blood. Still, the staff is alleged to have denied him his request for a trip to the emergency room. This is enough at the screening stage to establish both the knowledge and the disregard of a serious medical need required for a deliberate indifference claim under the Eighth Amendment.¹

Koch has also alleged that he had appendicitis, which ultimately required emergency surgery. This meets the standard for a "serious" medical need. *See Sherrod v. Lingle*, 223 F.3d 605, 610 (7th Cir. 2000) ("A condition is objectively serious if the failure to treat it could result in further significant injury or the unnecessary and wanton infliction of pain. As we found recently in a very similar case, an appendix on the verge of rupturing meets this standard.") (internal citations and quotation marks omitted). Therefore, Koch may proceed on his Eighth Amendment claim against the anonymous "John and Jane Does" of the medical and jail staff who denied his requests for care.

¹ It is unclear from Koch's pleadings whether he was a prisoner or a pretrial detainee at the time these events took place. Pretrial detainees are protected by the Fourteenth Amendment, which dictates that "a pretrial detainee may not be punished." *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Since the Seventh Circuit has recognized that the due process rights of a pre-trial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner," *Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005) (internal citation and quotation omitted), the protection that the Fourteenth Amendment affords him is "functionally indistinguishable from the Eighth Amendment's protection for convicted persons." *Smego v. Mitchell*, 2013 WL 3765295 (7th Cir. July 19, 2013). Thus, the court notes that while it is unclear which Amendment applies, its analysis remains the same under either circumstance.

At the same time, Koch has failed to state a claim against the Fond du Lac County Sheriff's Department (which has charge of the County Jail) or the Fond du Lac County Medical Staff to the extent he intends to sue them as governmental entities. Although Wisconsin municipalities may be sued, *see* Wis. Stat. § 62.25, agencies and departments may not. *See Best v. City of Portland*, 554 F.3d 698, 698 n.1 (7th Cir. 2009) (noting that “a police department is not a suable entity under § 1983”); *Buchanan v. City of Kenosha*, 57 F. Supp. 2d 675, 678 (E.D. Wis. 1999) (collecting cases). To the extent that the Fond du Lac County Sheriff's Department and the Fond du Lac County Medical Staff form a part of the county government that they serve, they are not “legal entit[ies] separable from the county government,” and so they are not subject to suit. *Whiting v. Marathon Cnty. Sheriff's Dep't*, 382 F.3d 700, 704 (7th Cir. 2004). The court will therefore dismiss them as defendants.²

Koch does not currently know the identities of the John and Jane Doe defendants, and he is no longer incarcerated at the Fond du Lac County Jail. Thus, the court will authorize service on the Fond du Lac County Sheriff's Department solely for purposes of obtaining the identity of those defendants.

Finally, while Koch's allegations against the John and Jane Doe defendants satisfy the court's lower standards for screening, he will ultimately need to come forward with *admissible* evidence permitting a reasonable trier of fact to conclude that the John and Jane Doe

² If Koch intended to name Fond du Lac County itself as a defendant, he has still not demonstrated a basis for § 1983 liability, since there is no respondeat superior liability under § 1983. *Gayton v. McCoy*, 593 F.3d 610, 622 (7th Cir. 2010). As a result, the county would not be liable unless Koch proved that the alleged deprivations were performed in keeping with “an official policy, widespread custom, or deliberate act of a county decision-maker of the municipality or department.” *Grieverson v. Anderson*, 538 F.3d 763, 771 (7th Cir. 2008) (internal quotation omitted). Koch has not alleged any facts that support this theory.

defendants acted with deliberate indifference to his serious medical need. This is a much higher standard than applied to an initial screening. Additionally, Koch should be aware that inadvertent error, negligence and gross negligence are insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996).

Specifically, going forward, it will be Koch's burden to prove that his condition constituted a serious medical need. Additionally, he must also prove that each defendant he identifies (1) *knew* his condition was serious and required treatment or caused serious pain and suffering, and (2) deliberately ignored his need for treatment. Both of these things might very well require Koch to provide credible expert testimony from a physician.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Ian Daniel Koch is GRANTED leave to proceed on his Eighth Amendment claims that unknown John and Jane Doe defendants, including medical staff members and jail staff members of the Fond du Lac County Jail, subjected him to cruel and unusual punishment by treating his serious medical needs with deliberate indifference.
- 2) Plaintiff is DENIED leave to proceed against the Fond du Lac County Sheriff's Department and the Fond du Lac County Jail.
- 3) The clerk's office will prepare summons and the U.S. Marshal Service shall effect service upon the Fond du Lac County Sheriff's Department solely to determine the identities of the John and Jane Doe defendants, consistent with this opinion, although summons will not issue against John and Jane Doe defendants until plaintiff discovers the real names of those parties from nominal defendant Fond du Lac County Sheriff's Department and amends his complaint accordingly.
- 4) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the 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 defendant's 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.

Entered this 15th day of October, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge