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

ANTONIO HARRIS,

Plaintiff,

v.

LT. DANE ESSER, CAPT. MICHAEL HANFIELD, SECURITY DIRECTOR JEROME SWEENEY, WARDEN TIM HAINES, BETH EDGE, THOMAS BROWN, ANDREW HULCE, DANIEL GOFF, DANIEL LEFFLER, JANET FISCHER, MATTHEW OSWALD and MICHAEL SHERMAN,

Defendants.

OPINION & ORDER

13-cv-883-wmc

In this proposed civil action, plaintiff Antonio Harris alleges that various correctional officers and employees at the Wisconsin Secure Program Facility ("WSPF") were deliberately indifferent to his medical needs and used excessive force against him by using incapacitating agents to extract him from his cell. Harris asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915, and has made his initial partial payment of $8.70, as required by § 1915(b)(1). The court must next determine whether Harris's proposed action (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Because Harris has stated a claim for relief against certain defendants, the court will permit him to proceed and will require the state to respond on behalf of those defendants.

ALLEGATIONS OF FACT[*]

A. Background

Plaintiff Antonio Harris is an inmate at WSPF and was incarcerated there at all times relevant to his complaint. The various defendants he names were all WSPF employees during this same time period.

Harris has a congenital heart condition known as "Tetralogy of Fallot," which includes four defects: (1) pulmonic stenosis; (2) ventricular septal defect; (3) malposition of the aorta; and (4) right ventricular hypertrophy. This condition results in decreased blood flow to the lungs and circulation of "blue blood" to the body tissue, which in turn causes cyanosis, clubbing of the fingers and toes, shortness of breath and extreme fatigue.

To cure Tetralogy of Fallot, Harris received open-heart surgery at the University of Wisconsin Hospital and Clinics in February of 2013. The surgery was successful, repairing all malfunctions in Harris's heart. Afterward, he was prescribed: 650 mg of acetaminophen; 20 mg of furosemide; 400 mg of ibuprofen; 5 mg of Oxycodone; 20 mg of potassium chloride; and aspirin.

B. Denial of Pain Medication

On May 5, 2013, defendant Thomas Brown was allegedly conducting "med pass" and "maliciously denied" Harris his pain medications, falsely claiming that "the medication wasn't on the cart," even though Harris had previously received the same medication from "the exact same cart on the exact same unit" during the noon "med pass" conducted by a different correctional officer. That same day, presumably as a result of the denial of pain

[*] In addressing a pro se litigant's pleadings, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). For the purposes of this order, the court accepts the plaintiff's well-pled allegations as true and assumes the facts articulated above.

medication, Harris pressed his medical emergency intercom and informed defendant Andrew Hulce that he was having severe chest pains and needed his medication. Hulce also refused to give Harris his medication despite this request.

C. Use of Incapacitating Agents

WSPF maintains a policy under which certain inmates may be contraindicated for the use of incapacitating chemical agents. This policy was adopted to protect inmates, as well as to protect WSPF staff members from civil and criminal liability. On April 1, 2013, Harris was declared "contraindicated" by Dr. Martin pursuant to this same policy in order to protect him from the risk of injury due to his recent open heart surgery.

Lt. Dane Esser has been involved in more than fifteen incidents involving the use of incapacitating agents and is, therefore, familiar with the protocols regarding their use and the contraindication policy. Nevertheless, on at least one occasion after Harris was declared contraindicated pursuant to policy, defendant Esser used incapacitating agents on a different inmate, Travanti Schmidt, who was housed in the same vestibule as Harris. In doing so, Esser failed to ensure the air handlers were shut off to avoid chemical agent contamination throughout the A-Unit ventilation systems, meaning that Harris suffered exposure to incapacitating agents.

On May 5, after Brown and Hulce denied Harris pain medication, Harris covered his cell window so that WSPF staff would be unable to "clear count" and would have to call a supervisor, who could then address Harris's health concerns. Consequently, at 9:00 pm, defendant Esser arrived at Harris's cell front and began a dialogue. Esser indicated that Harris would be placed in "control status" for covering his windows, although Harris was

only supposed to be placed on "paper property restriction." Esser also refused to consider Harris's health concerns and instead assembled a cell extraction team, consisting of defendants Hulce, Daniel Goff, Daniel Leffler, Janet Fischer, Matthew Oswald and Michael Sherman.

When the cell extraction team arrived at his cell front, Harris informed them multiple times that he was contraindicated for the use of incapacitating agents. Esser responded, "So what?" Defendant Beth Edge, a registered nurse, at some point told Esser that Captain Primmer had informed her that prison officials could violate the contraindication policy so long as certified medical personnel are present on the unit. She then cleared Esser to use the incapacitating agents, although it is unclear when this conversation took place. Harris alleges that defendants Hanfield, Sweeney and Haines -- another captain, the security director and the warden of WSPF, respectively -- also affirmatively authorized the use of the incapacitating agents, despite knowing that Harris was contraindicated for such agents.

Harris placed his pillow over his trap to attempt to avoid being sprayed with the incapacitating agents, but it did not work. Esser administered two, three-to-five-second bursts of incapacitating agent into Harris's cell. Harris was then instructed to remove the paper covering his cell window and to put his hands out, so that he could be restrained and escorted to a shower. Harris complied.

D. Resulting Health Problems

During the escort, Hulce noticed that Harris was having difficulty kneeling or standing due to his previous exposure to incapacitating agents. Additionally, Harris began

to suffer from shortness of breath, wheezing, dizziness, lung inflammation, numbness on the left side of his body, severe chest pains and blackouts.

After the shower, Harris was escorted to a strip cell without further incident. Since he did not resist, no staff-assisted strip search took place. Defendant Edge, who was apparently present, then refused to treat Harris, even though she was an RN and Harris was exhibiting signs of respiratory distress and suffering from fainting spells.

On May 8, 2013, Dr. Cox diagnosed Harris as asthmatic and prescribed him an inhaler. Harris had never had any respiratory problems before the use of incapacitating agents. Additionally, on May 11, Edge noted that Harris had begun having irregular heartbeats, even though he had never suffered from that problem before the May 5 incident. Cox ordered him to wear an event monitor for 30 days.

Harris continues to have problems with an irregular heartbeat. He is also being treated on an ongoing basis for asthmatic symptoms and has been prescribed two inhalers. Additionally, Harris is wheezing on a daily basis and has been scheduled to see a cardiologist.

Harris alleges that all these additional health problems are the result of the May 5 use of incapacitating agents against him. He seeks compensatory and punitive damages.

OPINION

I. Denial of Pain Medication

A. Deliberate Indifference

Harris first seeks to bring Eighth Amendment claims against Brown and Hulce for their actions in denying him his pain medication. Prison officials who do not provide

adequate medical care to prisoners may violate the Eighth Amendment, because such failures may cause pain or suffering that "serve[s] no penological purpose." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To state such a claim, an inmate must allege that: (1) he had an objectively serious medical need; and (2) the defendant was deliberately indifferent to that need, meaning that he was aware of and deliberately disregarded the substantial risk of serious harm to the inmate. *Id.* at 104; *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010).

A medical condition may be objectively serious if "the failure to treat it could result in further significant injury or the unnecessary and wanton infliction of pain." *Sherrod v. Lingle*, 223 F.3d 605, 610 (7th Cir. 2000) (quoting *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997)) (internal quotation marks omitted). The condition may also be objectively serious if it has been diagnosed by a physician as mandating treatment. *See Gutierrez,* 111 F.3d at 1373.

Here, Harris alleges that he had recently undergone open-heart surgery for a recognized, congenital heart condition and was prescribed a number of medications after the surgery, including some to help alleviate severe chest pains. Based on these allegations, the court has no trouble concluding that his condition, if untreated, could have resulted in possible complications or, at the very least, unnecessary pain. His condition was also diagnosed by a physician as mandating treatment, based both on the various prescriptions he received and his contraindication for incapacitating agents. Accordingly, Harris has successfully alleged an objectively serious medical need. *See, e.g.*, *Wynn v. Southward*, 251 F.3d 588, 594 (7th Cir. 2001) (inmate adequately alleged "serious medical need for his heart medication" where his heart had been fluttering and he risked heavy chest pains).

Harris also alleges that Brown "maliciously" withheld his prescribed medication by lying as to whether it was on the cart during med pass. Harris further alleges that he informed Hulce, via his emergency medical intercom, that he badly needed his prescribed medication due to severe chest pains, and that Hulce likewise refused to give him that medication.

If proven, these allegations would demonstrate that both Brown and Hulce knew Harris was at risk of suffering severe and unnecessary pain, but deliberately disregarded that risk by denying him his prescribed medications. Accordingly, Harris has stated a claim for deliberate indifference against these two defendants. *See, e.g.*, *Wynn*, 251 F.3d at 594; *Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999) (deliberate refusal to provide prescribed pain medication was a "gratuitous cruelty" precluding summary judgment on qualified immunity grounds).

B. Equal Protection

Harris also invokes the equal protection clause of the Fourteenth Amendment but does not adequately allege facts to support such a claim. Rather, he simply repeats the facts underlying his claim for deliberate indifference, stating that those actions violate his right to equal protection. Since Harris fails to allege *facts* suggesting that he was treated differently from similarly situated inmates in any way, and the court need not accept as true his legal conclusion that the denial of his medication constituted an equal protection violation, Harris may not proceed on this claim under the Fourteenth Amendment.

II. Use of Incapacitating Agents

A. Deliberate Indifference

Harris next states a claim for deliberate indifference resulting in danger to his existing health, which is also cognizable under the Eighth Amendment. *See Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001) (citing *Estelle*, 429 U.S. at 104). Like more typical claims for denial of medical treatment, an "existing health" claim under the Eighth Amendment must allege deliberate indifference to a serious medical need. For example, in *Alvarado*, the plaintiff alleged that because of prison officials' deliberate indifference, he was exposed to levels of environmental tobacco smoke that "aggravated his chronic asthma, thereby endangering his existing health." *Id.*

Likewise, here, Harris essentially alleges that due to defendants' deliberate indifference, he was exposed to incapacitating agents that seriously affected his health due to his recent surgery. As already discussed, Harris has certainly alleged a sufficiently serious medical condition: following a major surgery, the DOC itself medically classified him as contraindicated to the use of incapacitating agents in order to protect him from possible harm. (*See* Compl. Ex. (dkt. #1-1) 1.) Harris also alleges that each of the defendants *knew* he was contraindicated (indeed, he alleges that he repeatedly told them as much when they gathered at his cell front), but they deliberately disregarded the risk to his safety by using these very agents. Harris has, therefore, stated a basic claim for deliberate indifference to his existing health.

The only remaining question is whether each defendant was "personally involved" in the decision to use the prohibited chemical agent, since "§ 1983 lawsuits against individuals require personal involvement in the alleged constitutional deprivation to support a viable

claim." *Palmer v. Marion Cnty.*, 327 F.3d 588, 594 (7th Cir. 2003). While Harris names all twelve defendants, the court can immediately eliminate Brown, who is not alleged to have participated in the cell extraction or use of incapacitating agents in any way. Thus, the "existing health" claim is dismissed against Brown.

The remaining defendants have varying levels of alleged involvement when it come to the use of incapacitating agents. Defendant Esser, who actually administered the chemical bursts, was unquestionably involved in the alleged constitutional violation. Likewise, while supervisors may not be held liable simply by virtue of their supervisory status, *Minix v. Canarecci*, 597 F.3d 824, 834 (7th Cir. 2010), Harris has alleged that Edge, Hanfield, Sweeney and Haines affirmatively and explicitly *authorized* Esser's use of incapacitating agents despite knowing that it contravened WSPF's contraindication policy, which, if true, might support a finding of personal involvement in the Eighth Amendment violation Harris alleges. *See, e.g.*, *Chavez v. Ill. State Police*, 251 F.3d 612, 652 (7th Cir. 2001) (defendant could be deemed liable "if he directed the conduct causing the constitutional violation, or if it occurred with his knowledge or consent").

With respect to the other members of the cell extraction team, it is a very close question whether Harris has alleged enough to proceed. Harris's allegation that they actively "assisted" Esser in the use of the chemical agents cannot succeed, because his complaint also indicates that only Esser actually administered the agents. Regardless, it is a "long-established rule that '[a]n official satisfies the personal responsibility requirement of § 1983 if she acts or *fails* to act with a deliberate or reckless disregard of the plaintiff's constitutional rights." *Fillmore v. Page*, 358 F.3d 496, 506 (7th Cir. 2004) (quoting *Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir. 1982) (emphasis and alteration in original)).

Reading Harris's complaint generously, Harris has alleged just enough facts to support an inference that the other cell extraction team members failed to take action in reckless disregard of Harris's right to be free from cruel and unusual punishment. Harris alleges that they were all present when he informed Esser multiple times that he was contraindicated for the use of incapacitating agents, and by inference were also there to hear Esser say, "So what?" This arguably supports a finding of disregard for Harris's health. They then stood by as Esser administered six to ten seconds' worth of chemical agents to Harris, who tried and failed to shield himself. This is enough to proceed past screening against these defendants on the theory that they failed to act with a deliberate disregard for Harris's rights.[1]

B. Equal Protection

As above, Harris invokes not only the Eighth Amendment but also the Fourteenth Amendment in the context of the use of incapacitating agents. And, as above, any such equal protection claim fails here for the same reason: Harris has not alleged any facts suggesting that he was treated differently from similarly situated inmates. Accordingly, although he has been granted leave to proceed on an Eighth Amendment theory, he may not proceed on a Fourteenth Amendment theory as well.

[1] Of course, to the extent the facts also establish that these individual defendants heard and reasonably relied on the medical opinion of RN Esser, who allegedly cleared the use of incapacitating agents, they may not be liable of deliberate indifference. *See, e.g., McGee v. Adams*, 721 F.3d 474, 483 (7th Cir. 2013) (non-medical defendants may rely on judgment of medical professionals, unless they know or have reason to believe that prisoner is being mistreated).

C. Excessive Force

Reading Harris's complaint generously, he may have also intended to state a claim for excessive force premised on the use of the incapacitating agents. The central inquiry in a claim for excessive force arising under the Eighth Amendment is whether force was applied "in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm." *Fillmore*, 358 F.3d at 503 (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)). Prison officials violate the Eighth Amendment by using "mace or other chemical agents in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain." *Soto v. Dickey*, 744 F.2d 1260, 1270 (7th Cir. 1984); *see also Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 727 (7th Cir. 2013) (discussing "general proposition" that it is excessive to use pepper spray on subdued suspects).

Here, a reasonable factfinder could infer that Esser's use of chemical agents was intended to punish Harris or inflict pain. He knew that Harris was contraindicated for such agents, but when reminded of that fact, he disregarded it, saying "So what?" There is also nothing in Harris's complaint suggesting that he was recalcitrant or that the incapacitating agents were needed to restore discipline or gain his compliance. Based on his complaint alone, one might also infer that Harris would have been in severe pain following administration of the agents, having been denied his pain medication earlier that day. And although the incident reports in the record suggest that Harris resisted, his own statements contradict that characterization. (*See, e.g.*, Compl. Ex. (dkt. #1-3) 5 (offender statement at disciplinary hearing indicating that he "passed out" and "wasn't resisting").)

Thus, given the low bar of screening, Harris has stated a claim for excessive force against Esser. He may also proceed on that claim against the other members of the cell

extraction team based on a failure-to-intervene theory. Even so, Harris may not proceed on this claim against Edge, Brown or the supervisory defendants, since there are no facts alleged that suggest their authorization of Esser's use of force was malicious or intended to cause pain.

III. Denial of Treatment

A. Deliberate Indifference

Harris also alleges facts supporting a claim for denial of medical treatment against RN Edge. Specifically, Harris alleges that after the other defendants used incapacitating agents on him and he began to suffer obvious respiratory distress and fainting spells, Edge refused to give him any treatment. A medical need may be objectively serious if it is "so obvious that even a lay person would perceive the need for a doctor's attention." *Greeno v. Day*, 414 F.3d 645, 653 (7th Cir. 2005). Accepting Harris's allegations as true, the respiratory distress coupled with loss of consciousness he suffered would constitute a serious medical need under this standard. Harris also alleges that Edge was aware of these problems but refused to treat him. He has, therefore, stated a separate claim for deliberate indifference against Edge based on these facts.

Harris also invokes the denial of medical treatment as the basis for an Eighth Amendment claim against the other defendants (*see* Compl. (dkt. #1) ¶ 81), but he has not alleged facts suggesting that any of those other defendants were personally involved in a treatment decision. Rather, only Edge is actually alleged to have denied Harris medical treatment after the other defendants used incapacitating agents against him. Furthermore, Edge appears to be the only medical worker named in Harris's complaint. Generally speaking, "in determining the best way to handle an inmate's medical needs, prison officials

who are not medical professionals are entitled to rely on the opinions of medical professionals." *Lee v. Young*, 533 F.3d 505, 511 (7th Cir. 2008). Even presuming the other defendants *were* somehow personally involved in the decision to deny Harris post-spray medical treatment, they were entitled to rely upon Edge's expertise as a medical professional and cannot be held liable for such reliance. *See, e.g., McGee*, 721 F.3d at 483; *Lee*, 533 F.3d at 711.

Accordingly, Harris may not proceed against any other defendants for an Eighth Amendment claim premised on the denial of medical treatment.

B. Equal Protection

Harris once again invokes the Fourteenth Amendment's equal protection clause in the context of his claim for denial of medical treatment. For the same reasons discussed above, this claim is a non-starter.

IV. Individual and Official Capacity

Harris has named all defendants in both their individual and official capacities. (*See* Compl. (dkt. #1) ¶¶ 92(a)-(x).) For the most part, however, Harris asks only for money damages. Absent consent, the Eleventh Amendment bars "suits for money damages against state officials in their official capacities." *Wynn v. Southward*, 251 F.3d 388, 592 (7th Cir. 2001). Since no such consent is alleged here (nor is it likely), Harris may proceed only against the majority of the defendants in their individual capacities.

At the same time, Harris requests injunctive relief prohibiting the use of incapacitating agents on inmates who are contraindicated, presumably to remove the workaround that Edge allegedly cited to support the use of those agents against Harris. "[A]

claim for injunctive relief can stand only against someone who has the authority to grant it." *Williams v. Doyle*, 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007). While nothing suggests that any of the non-supervisory defendants have the authority to institute the policy Harris seeks, he may proceed on his request for injunctive relief against Security Director Sweeney and Warden Haines in their official capacities, since they would likely have the authority.

Finally, although Harris's allegations pass muster under the court's lower standard for screening as to his deliberate indifference claims, he will have to present admissible evidence permitting a reasonable trier of fact to conclude that defendants acted with deliberate indifference to his serious medical need to be successful on his claim, which is a high standard. Inadvertent error, negligence or even gross negligence are all insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). In particular, it will be Harris's burden to prove: (1) his condition constituted a serious medical need; and (2) perhaps even more daunting, that the defendants knew his condition was serious, caused associated pain and suffering, could be relieved by prescription medication and deliberately ignored his need for this medication. Both elements may well require Harris to provide credible, expert testimony from a physician in the face of medical evidence to the contrary.

ORDER

IT IS ORDERED that:

1) Plaintiff Antonio Harris is GRANTED leave to proceed on his Eighth Amendment claims against:

    a. Defendants Thomas Brown and Andrew Hulce, in their individual capacities, for deliberate indifference in denying him his pain medication.

b. All defendants, except Brown, in their individual capacities, and defendants Jerome Sweeney and Tim Haines, in their official capacities, for deliberate indifference to his existing health by use of incapacitating agents.

c. Defendants Lt. Dane Esser, Hulce, Daniel Goff, Daniel Leffler, Janet Fischer, Matther Oswald and Michael Sherman, in their individual capacities, for excessive force based on the use of incapacitating agents and failure to intervene.

d. Defendant Beth Edge, in her individual capacity, for deliberate indifference to his serious medical needs in denying him treatment following the use of incapacitating agents.

2) Plaintiff is DENIED leave to proceed on any other claims.

3) 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 forty (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.

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 8th day of January, 2015.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge